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100

New Jersey Court of Errors and Appeals

ESSEX COUNTY CIRCUIT COURT

FRANK DEPEW, surviving partner of Edward D. Depew and Frank Depew, lately trading as Edward D. Depew & Co., Plaintiff-Appellant, vs. SAMUEL BLAFER, Defendant-Respondent.	}	Action at Law, On contract. 20
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Notice of Appeal

(Filed, August 18, 1916)

To Samuel MacDonald, Attorney of Defendant-Respondent: 30

Take notice that the plaintiff appeals to the New Jersey Court of Errors and Appeals from the whole of the judgment entered in this cause in the Essex County Circuit Court.

SAMUEL W. BOARDMAN, JR.,
Attorney of Plaintiff-Appellant. 40

Grounds of Appeal

COURT OF ERRORS AND APPEALS

10	FRANK DEPEW, surviving partner, etc., <div style="text-align: right; padding-right: 20px;">Plaintiff-Appellant,</div>	}	Action at Law. On Appeal.
	vs.		
	SAMUEL BLAFER, <div style="text-align: right; padding-right: 20px;">Defendant-Respondent.</div>		

Frank Depew, surviving partner of Edward D. Depew and Frank Depew, lately trading as Edward D. Depew & Company, plaintiff below, having served his notice of appeal from the Essex

20 County Circuit Court upon Samuel Blafer the defendant below, (by service upon his attorney, Samuel J. MacDonald, Esquire), now for grounds of said appeal sets forth the following:

1. The Court refused to direct a verdict for the plaintiff.
- 1a. The Court admitted oral evidence to vary the written contract.
2. The Court ruled that the jury might find that
- 30 there was no contract legally binding upon the defendant.
3. A writing purporting to be an affidavit of David Schleir was admitted in evidence "for anything that it will prove." It has these objectionable features:
 - (1) It was incompetent.
 - (2) It was vicious as attempting to vary a writ-
 - 40 ten contract between the parties.

Grounds of Appeal

(3) It was an extrajudicial statement of a private person and so was inadmissible under the hearsay rule.

(4) David Schleire was in Court, available as a witness for defendants.

(5) This paper was signed on Sunday and sworn to, if at all, on that day. 10

(6) The paper was prepared pending suit, and but shortly before trial.

(7) The paper was signed under misunderstanding and duress.

4. The Court admitted other improper evidence, as appears noted in the record, over plaintiff's objections. (The appellant intends to specify by 20 page and line after the case is printed).

5. The Court excluded proper evidence as appears noted in the record (plaintiff's offers overruled). (The appellant intends to specify by page and line after the case is printed).

6. The Court refused to receive written questions for submission to the jury, under the Practice Act of 1912.

SAMUEL W. BOARDMAN, JR., 30

Attorney for plaintiff-appellant.

Sept. 12, 1916.

(Endorsed)

Original served & Ackd.

Sept. 12, 1916.

Mailed to Trenton 9/15/16.

40

Deputation

I hereby appoint and depute John E. Givens to serve the within writ.

Witness my hand and seal this 20th day of August, 1914.

10

JOHN F. MONOHAN,
Sheriff.

By Harvey W. Keough,
under Sheriff, (L.S.).

Served the within summons and complaint with a 10 days notice endorsed thereon Aug. 21, 1914, personally upon Samuel Blafer the within named defendant at his usual place of abode 125 Prince
20 Street, Newark, N. J.

JOHN F. MONOHAN,
Sheriff.

By J. E. Givens,
Special Deputy.

Affidavit of Service of Summons and 30 Complaint

State of New Jersey, }
County of Essex. } ss:

John E. Givens, Special Deputy Sheriff of the county aforesaid, being duly sworn, on his oath deposes and says that on the 21st day of August, A. D., 1914, he delivered personally to the said de-
40 fendant, Samuel Blafer, a true copy of the within

Summons

summons and complaint, with a ten days' notice endorsed thereon.

J. E. GIVENS,
Special Deputy.

Subscribed and sworn to, this
26th day of August, A. D., 1914.

Charles M. Myers,
Master in Chancery of New Jersey.

10

Summons

(Filed, Aug. 26, 1914).

The State of New Jersey to Samuel Blafer:

20

YOU ARE SUMMONED to answer the annexed complaint of Edward D. Depew and Frank Depew, partners trading as Edward D. Depew & Co., in an action at law in the Essex County Circuit Court. And take notice that unless you file your answer to said complaint with the Clerk of the said Essex County Circuit Court, at Newark within twenty days, after the service upon you of this writ, and the annexed complaint, the plaintiffs may proceed in the suit, and judgment may be entered against you.

30

WITNESS William S. Gummere, Judge of the said Circuit Court at Newark, this nineteenth day of August, Nineteen hundred and fourteen.

JOSEPH McDONOUGH,
Clerk.

Samuel W. Boardman, Jr.,
Attorney,
Union Building,
Newark, N. J.

40

Complaint*(Filed, Aug. 26, 1914)*

ESSEX COUNTY CIRCUIT COURT

10	EDWARD D. DEPEW and FRANK DEPEW, partners, etc., Plaintiffs, vs. SAMUEL BLAFER, Defendant.	}	Action at Law. Complaint.
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PLAINTIFFS, Edward D. Depew and Frank Depew, partners trading as Edward D. Depew & Co., Residing respectively at 70 St. Nicholas Place and at 400 West 152nd Street, Manhattan Borough, New York City, N. Y., says that plaintiffs are in fact partners as above set forth;

2. That on August 10, 1914, at Newark, N. J., defendant sold plaintiffs 100 barrels of fine granulated sugar (350 lbs. per barrel) at \$5.10 per cwt. (\$5.10 per 100 lbs.) with discount at 2 per centum (2%) if paid within 10 days after delivery.

3. That a note or memorandum in writing of the contract or sale was signed by the defendant or his agent in that behalf.

4. That plaintiffs gave \$150.00 in earnest to bind the contract or rather in part payment for said sugar.

5. That plaintiffs have been constantly and are now willing and ready to perform fully their part; to take the sugar and to pay therefor.

Complaint

6. That defendant has hitherto neglected and on August 13, 1914, refused to deliver the sugar.

7. That the market price of such sugar is and was \$7.50 per cwt. (hundred weight) at the time when defendant should have delivered said sugar.

10

\$7.50

5.00

$$2.50 \times 3 \frac{1}{2} \times 100 = \$875.00$$

Judgment will be claimed for the sum of \$875.00 (Eight hundred and seventy-five dollars) with interest from the 17th (seventeenth) day of August, A. D., 1914, together with costs.

(Signed) SAMUEL W. BOARDMAN, JR., 20
Plaintiffs' Attorney.

(Endorsed)

ESSEX COUNTY CIRCUIT COURT

EDWARD D. DEPEW, *et al.*,

Plaintiffs,

vs.

SAMUEL BLAFER,

Defendant.

Action at Law.
On Contract.

30

SUMMONS AND COMPLAINT

SAMUEL W. BOARDMAN, JR.,

Plaintiffs' Attorney,

P. O. Address, Union Building,

Newark, N. J. 40

Affidavit of Merits

Notice to the within named defendant

In case the within Writ of Summons and Complaint are served upon you personally, then take notice that if you intend to make a defense to this action, you must file an Affidavit of Merits within
 10 ten days from the date of service thereof upon you, and must file your answer within twenty days from date of such service, and in default thereof, judgment will be entered against you; Lawful Service upon a Corporation, is deemed personal service for the purpose of this notice.

(signed) SAMUEL W. BOARDMAN, JR.,
 Plaintiffs' Attorney.

Sheriff's Fee \$2.80.

Filed Aug. 26, 1914.

20 Joseph McDonough,
 Clerk.

Affidavit of Merits

(Filed, August 25, 1914)

ESSEX COUNTY CIRCUIT COURT

30 EDWARD D. DEPEW and FRANK DEPEW, partners, etc., vs. SAMUEL BLAFER.	}	Action at Law.
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State of New Jersey, }
 County of Essex. } ss:

40 Samuel Blaffer, being duly sworn upon his oath saith, that he is the defendant in the above stated

Answer

cause; and that the affiant believes that he, the defendant, has a just and legal defense to the action on the merits of the case.

August 26, 1916.

SAMUEL BLAFER.

Subscribed and sworn to the 10
 twenty-fourth day of August, A. D., 1914,
 before me
 George H. Hepp,
 An Attorney at Law of the
 State of New Jersey.

(Endorsed)

S. J. MacDonald,
 Attorney of Defendant. 20

Answer

(Filed, September 4, 1914)

ESSEX COUNTY CIRCUIT COURT

EDWARD D. DEPEW, <i>et al.</i> , part- ners, etc., vs. SAMUEL BLAFER.	}	Action at Law.	30
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Defendant, residing in Newark, New Jersey,
 says that:

1. He denies the truth of the matters contained
 in the complaint. 40

Answer

2. He denies that plaintiffs paid the sum of \$150.00 or any other sum, in earnest to bind the contract, or in part payment for said sugar.

3. He denies that plaintiffs have been ready and are now ready and willing to perform fully their part; to take the sugar and to pay therefor.

4. He denies that defendant on August 13, 1914, or at any other time, refused to deliver said sugar.

5. He says that said contract of sale stated in said complaint, if the same was ever legally made, was duly rescinded, abrogated and made null on August 11, 1914.

6. He says that said contract of sale stated in said complaint was and is invalid, null and void because no note or memorandum in writing of said contract was signed by defendant.

7. He says that said contract of sale stated in said complaint was and is invalid, null and void because no consideration was given therefor by plaintiff to defendant.

8. He says that said contract of sale stated in said complaint was and is illegal, invalid, null and void, because the same was a wagering contract, contrary to the form of the statute in such case made and provided.

SAMUEL J. MACDONALD,
Attorney for Defendant.

Endorsed

Suggestion of Death

(Filed, Dec. 8, 1914)

ESSEX COUNTY CIRCUIT COURT

EDWARD D. DEPEW, <i>et al.</i> , <div style="text-align: right; padding-right: 20px;">Plaintiffs,</div>	}	Action at Law.	10
vs.			
SAMUEL BLAFER, <div style="text-align: right; padding-right: 20px;">Defendants.</div>	}	On Contract.	

And now at this day, to wit, the second Tuesday of December, 1914, before the Judges of the Circuit Court for Essex County, New Jersey, at Newark, aforesaid, comes Frank Depew, surviving partner of the firm of Edward D. Depew & Co. lately consisting of Edward D. Depew now deceased and said Frank Depew, by Samuel W. Boardman, Jr., his attorney; and hereupon the said Frank Depew gives the Court here to understand and be informed, that pending this suit and before this day the said Edward D. Depew died whereupon the conduct of the business of said Edward D. Depew and said Frank Depew survived to the said Frank Depew.

Therefore let all further proceedings in this cause be continued in the name of the said Frank Depew surviving partner of said firm of Edward D. Depew & Co. And now at this day, to wit, on the second Tuesday in December, 1914, before the judges aforesaid at Newark, New Jersey, come the parties aforesaid, by their attorneys aforesaid, etc.

Let foregoing rule be entered.

FREDERIC ADAMS,
Circuit Court Judge. 40

Replication*(Filed, June 9, 1915)*

ESSEX COUNTY CIRCUIT COURT

10	FRANK DEPEW, surviving partner, etc.,	}	Action at Law.
	Plaintiff,		
	vs.		
	SAMUEL BLAFER,	}	Action at Law.
	Defendant.		

20 The plaintiff recognizing the first, second, third and fourth paragraphs of defendant's answer as denials and the fifth, sixth and seventh paragraphs as virtually denials, yet on account of their several affirmative forms and the real affirmation of the eighth paragraph, replies as follows:

1. Plaintiff denies the fifth paragraph of defendant's answer, that is he denies the abrogation of the contract sued upon.

2. He denies the sixth paragraph of defendant's answer, that is he denies invalidity of the contract sued upon under the reason therein alleged.

3. He denies the seventh paragraph of defendant's answer, that is he denies the invalidity of the contract sued upon under the reason therein alleged.

4. He denies the eighth paragraph of defendant's answer, that is he denies that the contract sued upon was a wagering contract.

SAMUEL W. BOARDMAN, JR.,
Attorney for Plaintiff.

Judgment

(Endorsed)

Service of a copy of the within replication is hereby acknowledged and consent is hereby given that this be filed as of due time.

S. J. MACDONALD, 10
Attorney for Defendant.

Judgment

ESSEX COUNTY CIRCUIT COURT

25907

FRANK DEPEW, surviving partner of the firm of Edward D. Depew & Co.,

Plaintiff,

vs.

SAMUEL BLAFER,

Defendant.

Action at Law. 20
On Verdict by a Jury.
Judgment for Defendant.
Costs \$57.78.

Samuel J. Macdonald, Atty. of defendant:

This action was tried before Judge Frederic Adams with a jury at the Essex County Circuit on October 6th, 1915. 30

The cause having been heard and submitted to the jury, they return their verdict as follows:

They find in favor of the defendant, Samuel Blaffer, and against the plaintiff, Frank Depew, surviving partner of the firm of Edward D. Depew & Co. 40

Clerk's Certificate

Whereupon it is adjudged that the complaint of the plaintiff be dismissed and the defendant recover of the plaintiff costs which are taxed at Fifty-seven dollars and seventy-eight cents.

Judgment entered and signed October 6th A. D.,
10 1915.

WM. S. GUMMERE,
Judge.

Book 93, page 193.

Clerk's Certificate

ESSEX COUNTY CLERK'S OFFICE

20
(Seal)

State of New Jersey, }
County of Essex. } ss:

I, Joseph McDonough, Clerk of the Circuit Court, in and for the County of Essex in the State of New Jersey,

30 Do HEREBY CERTIFY that the foregoing is a true and correct copy of the Notice of Appeal and entire transcript of all the Pleadings and Proceedings and the Judgment record in the case of Frank Depew, surviving partner, etc., vs. Samuel

Blafer, and the same is taken from and compared with the original papers and record in my office.
and

40 as the same now remains on the files of said office.
IN TESTIMONY WHEREOF, I have hereunto

Testimony

(Seal) set my hand and affixed the official
 (Stamp) seal of said Court and County at
 Newark, N. J., this seventh day of
 September, A. D., 1916.

JOSEPH McDONOUGH,
 Clerk. 10

(Endorsed)
 Entire transcript of proceedings
 filed Sept. 1916.

Testimony

ESSEX CIRCUIT COURT

Monday, October 4, 1915

FRANK DEPEW, surviving part- ner of the firm of Edward D. Depew & Company, vs. SAMUEL BLAFER.	}	Action at Law.
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20

Before HON. FREDERIC ADAMS, J., and a Jury.

For plaintiff appears Samuel W. Boardman, 30
 Jr., Esq.

For defendant appear Samuel J. McDonald,
 Esq., and Jacob Siff, Esq.

A jury is called and sworn.

At 1 o'clock p. m., the Court takes a recess of
 one hour.

After recess.

40

Isidor Silberman—Direct

Mr. Boardman opens for plaintiff.

Mr. McDonald opens for defendant.

ISIDOR SILBERMAN, sworn in behalf of plaintiff:

10

Direct-examination by Mr. Boardman:

Q. Mr. Silberman, where do you live? A. 326 Springfield Avenue, Newark.

Q. What is your business? A. I am representative of E. D. Depew & Company, New York, salesman and collector.

Q. How long have you been in their employ? A. About nineteen months, I believe.

Q. You were in their employ in August, 1914?
20 A. I was.

Q. Did you represent them in the purchase of articles generally? A. Why, once in a while.

30

Mr. Macdonald: One moment. I move that that answer be stricken out, if the Court please. It was given before there was an opportunity of objection. The question is objectionable, in the first place, because it is leading, and, in the second place, because it has no relevancy at this time to this issue, and, in the third place, because agency cannot be proven merely by the declaration of the agent himself, but must arise either from some documentary authority or from the circumstances.

The Court: Perhaps the witness was about to state the circumstances. I will strike out the question, however, under the objection.

40

Q. Mr. Silberman, do you remember a transac-

Isidor Silberman—Direct

tion of last August with this defendant, Samuel Blafer? A. I do, perfectly.

Q. On what day? A. Monday, August 10, 1914.

Q. What was the nature of the transaction? A. I purchased and Mr. Blafer sold me 100 barrels—

Mr. Macdonald: One moment. This is an action upon a written contract, if the Court please. Now, my friend is attempting to introduce oral evidence as to what the contract was. It is entirely inadmissible. The contract ought to be first proven, and then, if it can be proven, it speaks for itself. 10

The Court: Where do you get the information that it is a written contract?

Mr. Macdonald: He states in paragraph 3 of the declaration that a note, or memorandum, in writing of the contract, or sale, was signed by the defendant or his agent in that behalf, and that was also the opening. 20

Mr. Boardman: That does not represent that we are suing on a written contract. We shall bring in the writing in due season.

The Court: I think the witness may go on with his statement.

Defendant's counsel pray an exception to this ruling of the Court. 30

Exception noted as ground of appeal.

Q. What was the transaction, Mr. Silberman?

A. I purchased of and Mr. Samuel Blafer sold to E. D. Depew & Company 100 barrels of granulated sugar, at \$5.10 per hundred, less two per cent in ten days, delivery to be made immediately.

Q. Was there any memorandum of that sale? 40

Isidor Silberman—Direct

A. Yes, I wrote out a contract, as best I could, and signed it for E. D. Depew & Company and had the seller sign it.

Q. I show you this paper, dated August 10, 1914 (paper shown to witness). Is that your signature, "I. Silberman"? A. That is.

Q. After the word "Witness"? A. Correct.

Q. And what is this at the bottom (indicating)? A. That is the signature of S. Blafer, signed by Mrs. Blafer, because he cannot write English, or write his name, and she signed it at his instructions in my presence.

Mr. Boardman: I offer this in evidence (handing paper to defendant's counsel).

Mr. Macdonald: I object to the admission of this memorandum in evidence, in the first place, because it does not set forth the agreement which the witness stated he entered into with Samuel Blafer. The witness said, "I purchased of Samuel Blafer 100 barrels of granulated sugar, at \$5.10 a hundred, delivery to be made immediately." He stated in his testimony expressly that he signed the contract for Edward D. Depew & Company. Now, this is not such a contract whatever. In the first place, the printed words at the top of it "Edward D. Depew & Company, New York, N. Y.," are struck out, and then underneath in writing it says, "E. D. Depew & Company, address, New York City; shipping directions; factory shipment; terms, two per cent, ten days;" and then it says, "100 barrels granulated sugar, at \$5.10," and says, "Witness, Silberman;"

Isidor Silberman—Direct

which is not what he testified to that the agreement was at all.

Mr. Boardman: I call your attention to the word "Sold," and, I think, other words which Mr. Macdonald omitted.

The Court: I will receive it.

Defendant's counsel pray an exception to this ruling of the Court. 10

Exception noted as ground of appeal.

Paper marked Exhibit P-1.

Q. Mr. Silberman, whom were you representing on that occasion? A. Edward D. Depew & Company.

Q. Had you had specific communication with the house on this matter, or on the matter of sugar? 20

Objected to.

A. Yes, sir.

Question withdrawn.

Q. You have testified that this was signed by Mrs. Blafer? A. Yes.

Q. Who were present at that time? A. Mr. Blafer, myself and his clerk, David Schleier.

Q. What did Mr. Blafer say to his wife or to you in connection with that signing? A. Why, he said nothing to me; he told his wife to sign it. 30

Q. What did he say to his wife?

The Court: What did he say in your presence?

A. He told his wife to sign that contract, because, as I have said before, he doesn't write.

The Court: No, just what did he tell her?

Witness: He said, "Sign that contract," and she signed it and handed it back to him, and consequently it reached me; he handed it back to me.

Q. Who was it that handed it to you? A. Mr. Blafer. 40

Isidor Silberman—Direct

Q. After it had been signed? A. After it had been signed.

Q. Was there any money that passed at that time? A. There was a \$150 check that I gave to Mr. Blafer as a deposit and for which I received a receipt.

10 Mr. Macdonald: I move that this part of the answer be stricken out, all after the "\$150 check," because, in the first place, it is not responsive, and, in the second place, that this check was deposited by the defendant, at least at the present stage of the case, is manifestly based upon hearsay.

The Court: Perhaps I did not understand the witness exactly as you did. I thought the witness said, "There was a \$150 check which I gave as a deposit, for which he gave me a receipt." Is that it?

Mr. Boardman: Yes, sir, that is it.

Mr. Macdonald: I did not understand the witness exactly.

(The stenographer reads the last answer.)

The Court: I will let the testimony stand.

30 Q. I show you a paper dated August 10, 1914, and apparently signed, "S. Blafer" (paper shown to witness). What is that paper? A. Why, that is the receipt for the \$150 check.

Q. Did you see that signed? A. I did, sir.

Q. By whom was that signed? A. By Mrs. Blafer.

Q. Why did she sign it? A. Mr. Blafer instructed her to; he doesn't write.

40 Q. Was that at this same interview? A. At the

Isidor Silberman—Direct

same time. She signed both papers at the same time, in fact.

Q. The same persons being present? A. Yes, sir.

Mr. Boardman: I want to offer this in evidence (handing paper to defendant's counsel). 10

Mr. Macdonald: I am unable to say anything about that, may it please the Court. Paper marked Exhibit P-2.

Mr. Boardman: Now, Mr. Macdonald, you have that \$150 check, have you?

Mr. Macdonald: No, sir.

Mr. Boardman: I served you with this notice to produce.

Mr. Macdonald: Yes. I do not know why that notice was served upon us. We certainly have not any check. If that check had been paid, of course, it would go back to the maker of the check. I do not need to instruct counsel as to that. The check would be no earthly use to us, and we haven't it. 20

Mr. Boardman: Have you these letters and telegrams that are mentioned in the notice to produce?

Mr. Macdonald: I have one letter and one telegram which purport to come from these plaintiffs, but which bear no evidence that they came from the plaintiffs. That is all I have. There has been a demand on me to produce apparently a vast amount of correspondence, which we are absolutely ignorant of. We have one letter and one telegram, and that is all we ever did have. 30 40

Isidor Silberman—Direct

Q. Mr. Silberman, what did you do after this interview? A. After buying the sugar—

Mr. Macdonald: One moment. I do not see how it is material or how it can bind this defendant, what he did.

10 Mr. Boardman: I will modify the question.

Q. Mr. Silberman, what is the next time that you saw Mr. Blafer or had any interview with him? A. Well, I don't remember having any interview with him after that—at least, not pertaining to the sugar.

Q. Have you had any interview with Mrs. Blafer since that time with regard to any of this matter? Have you seen her since then? A. Yes, 20 I have seen her several times, but spoken to her once. She called at my house two or three days after that, while I was there, and told me that they couldn't deliver the sugar because they had to have the money immediately and we didn't give it to them, and she threw the check I gave her down on a table and started to walk out. I picked up the check and walked after her and threw it after her, and said, "This is yours and not mine," and shut the door and went back and finished my lunch. That was all. 30

Q. Have you seen that check since? A. No, sir; I have not.

Q. Do you know whether Mr. Blafer has made any delivery of sugar? A. He has not.

Mr. Macdonald: I object. There is no foundation laid for any knowledge of this witness, who is a salesman and collector, as to whether any sugar was delivered or not. 40

Isidor Silberman—Direct

The Court: The question is whether he knows.

Mr. Macdonald: Yes.

The Court: Not whether he was bound to know, but whether he does know.

Q. Do you know whether any delivery was made? A. There was not. If there was, we wouldn't sue. 10

Mr. Macdonald: One moment. I move that the answer be stricken out. In the first place, it is not responsive. The Court admitted this because it was merely a question whether he knows. Now instead of answering that he proceeds to volunteer the assertion that there was no delivery. 20

Witness: Well, I will change that to I do know.

The Court: What is it that you know?

Witness: That there was no delivery made of the sugar.

Q. This check for \$150 that you have testified to, Mr. Silberman, was whose check? A. It was given to me by J. Krasner, of 271 Hunterdon street, Newark, New Jersey, at my request; I told him I wanted to buy some sugar and use that as a deposit. 30

Q. And what did you give him for that check?

Objected to.

The Court: How could that affect the question?

(Question withdrawn.)

Q. This check was made by whom, you say?

A. J. Krasner.

Q. To whose order? A. To my order, and endorsed by me, given by me to Blafer. 40

Isidor Silberman—Cross

Q. Has Mr. Krasner been settled with with regard to that?

Objected to.

A. Oh, yes.

10 The Court: When an objection is made, do not answer.

Mr. Macdonald: I object, as it is entirely immaterial to this issue, and irrelevant.

The Court: I sustain the objection. My thought was that transactions with Mr. Krasner were irrelevant. I will hear Mr. Boardman, if he desires it.

Mr. Boardman: Very well.

20 Q. Mr. Silberman, did you receive a telegram on August 10, 1914, regarding the purchase of sugar? A. I did.

Objected to.

The Court: The question may be answered either yes or no. It does not appear from the question from whom it was.

Mr. Macdonald: I do not see how it can be material when even the fact that he received the telegram is immaterial unless it was from the defendant.

30 The Court: It is not yet connected with the case. The witness has answered the question categorically.

Q. Yes or no? A. Yes.

Q. Have you that telegram? A. No, I have not.

Q. What has become of it?

Objected to.

(Question withdrawn.)

CROSS-EXAMINATION by Mr. Macdonald:

40 Q. Mr. Silberman, when did you enter the em-

Isidor Silberman—Cross

ploy of Edward Depew & Company in New York City? A. February of 1914.

Q. That was, then, about three or four months before this interview with Mr. Blafer that you have testified to? A. No, sir; it was six months.

Q. What time in February was it? A. February 6th. 10

Q. February 6th? A. Yes.

Q. And this was in August? A. The 10th.

Q. The 10th? A. Yes.

Q. Six months? A. Yes.

Q. And you were employed by Edward D. Depew & Company, as a collector, were you not?

A. As a collector and salesman.

Q. Were not your duties principally collector of the accounts which they had with their numerous customers? A. No, sir. 20

Q. You had a great many bills to collect for them, did you not? A. Whoever I sold goods to; I had to sell the goods first to them.

Q. Please answer the question. You had a great many bills to collect for them, did you not?

A. I did.

Q. Yes. What territory did you have to collect in?

Mr. Boardman: I object, your Honor. 30
It seems to me this is irrelevant.

The Court: I will admit it on the ground that it tends to show the status and relation of the witness.

Q. What territory did you have at that time?
A. Newark, the Oranges, Bloomfield, Montclair, Sullivan county, part of Ulster county and part of Orange county, New York State.

Q. And you devoted one day a week to each 40

Isidor Silberman—Cross

section of that territory in collecting usually, did you not? A. No.

Q. You could not cover all of that territory in one day, could you? A. No, part of it one day and several days in the other part.

10 Q. Now, you came to see Mr. Blafer on Monday morning, August 10th, last year? A. Yes, it was on Monday.

Q. What time in the morning did you get there? A. I didn't say it was in the morning.

Q. What time did you get there? A. I don't know, but it was somewhere around noon.

Q. Was it not very early in the morning? A. No, sir.

20 Q. Was it not just as you were starting out to collect your accounts? A. No, sir.

Q. Did you not have a bundle of the accounts with you at that time to collect? A. I might have.

Q. Well, did you not have? Do you not remember? A. No, I don't, because it was immaterial whether I did or not.

Q. You remember very distinctly that this was Monday, August 10th, and you remember very distinctly everything that occurred with Mr. Blafer, do you not? A. I do.

30 Q. But you do not remember so distinctly whether you had a bunch of accounts that you were to collect with you? A. No, because I don't always carry statements.

Q. I am not asking you for the reason; I am asking for the fact. Now, you were in considerable of a hurry to get this arrangement made with Mr. Blafer, were you not? A. I was.

40 Q. And were you not in so much of a hurry to get away with it that you went away and left

Isidor Silberman—Cross

your accounts that you should collect with Mr. Blafer? A. Yes, sir.

Q. Did you not leave this bunch of accounts in Mr. Blafer's place that morning (papers shown to witness)? A. Yes, sir.

Q. Did you ever go back to get them? A. No, sir; I didn't think it was worth while.

Papers identified by witness are marked D-1 for identification.

Q. Now, you said in your direct examination, Mr. Silberman, that you drew up this memorandum of agreement with Mr. Blafer; is that right? A. Yes.

Q. In the first place, why did you strike out the name "Edward D. Depew & Company" at the top? A. Because if I hadn't it would have meant that Edward D. Depew & Company had sold the sugar, and, if you will read it, it says, "Sold to Edward D. Depew & Company."

Q. Thank you! You were very much afraid that this agreement might mean something different from what you intended it to mean; is that the idea? A. Well, if you look at it that way, yes.

Q. Well, I am trying to find out how you looked at it that morning. A. Well, I was trying to make it look as if I had bought the sugar, not sold it.

Q. And, in point of fact, you did buy the sugar, did you not? A. I certainly did, if ever I did anything.

Q. Now, you said also in your direct examination that you signed this contract on behalf of Edward D. Depew & Company? A. That is right.

Isidor Silberman—Cross

Q. Is that correct? A. Yes, sir.

Q. Well, if that is correct, and you were so anxious and particular about having this contract mean exactly what it should mean, why did you sign here, "Witness, I. Silberman"? A. Because
10 I was a witness to the signature of S. Blafer; I signed that after "S. Blafer" was on the paper.

Q. Just read that line there in front of your signature, including your signature. A. "Witness, I. Silberman."

Q. Does that say anything about E. D. Depew & Company? A. No, it says so on top; it doesn't say it down there.

Q. I am asking you about your signature there, "Witness, I. Silberman." A. No, it does not.

Q. It does not say anything about E. D. Depew & Company? A. No, sir.
20

Q. Now, you say Mr. Blafer cannot read or write the English language; is that correct? A. No, sir; I said he can't write the English language or sign his name.

Q. And you also say that his wife signed his name for him to this supposed contract? A. Yes.

Q. That is correct, is it? A. Yes.

Q. You said on your direct examination that Mr. Blafer told his wife and said to her, "Sign that contract?" Is that true? A. Yes.
30

Q. Did he use those very words: "Sign that contract?" A. No, sir; he doesn't speak English.

Q. Well, did he use the Russian equivalent or the Jewish equivalent? A. He used the Jewish equivalent.

Q. Translated it would be, "Sign that contract;" is that correct? A. Yes.
40

Isidor Silberman—Cross

Q. Now, will you tell us the Yiddish, or Jewish, that he used? A. Yes.

Q. Well, what was it? A. In Yiddish?

Q. Yes. A. "Sign um contract."

Q. "Sign um contract"? A. Yes.

Q. And he used the word "contract"? A. 10
Yes.

Q. And you are very positive and explicit about that? A. Yes.

Q. Now, you never went to see Mr. Blafer after that about this transaction? A. No; I have spoken to him, but I never went to see him personally about that.

Q. And you say that two or three days afterwards Mrs. Blafer came to your house to see you? A. Yes. 20

Q. What day did she come to see you? A. Well, it was either Wednesday or Thursday or Tuesday; it was two or three days after Monday.

Q. Well, it might have been Tuesday? A. I don't know; I don't believe it was, but it might have been.

Q. Yes, it might have been Tuesday. If it was Tuesday, then it was the day following? A. If it was, yes.

Q. That is what you mean when you say it might have been Tuesday? A. It might have been. 30

Q. She came to your house very early in the morning, did she not? A. I don't remember; I think I was having some meal at the time.

Q. Did she not come up to your house before you got up out of bed? A. Oh, no.

Q. Was she not waiting for you when you got out of bed? A. Not that I remember; she might have been. 40

Isidor Silberman—Cross

Q. Was she not waiting for you before you got your breakfast? A. She might have; I don't recollect.

10 Q. You are not quite so clear minded about what happened then as what happened on Monday, are you? A. I didn't think that that mattered any, whether she got there before I got up or I got up before she got there.

Mr. Boardman: If your Honor please, I do not see how he could be expected to tell whether she was waiting outside or not.

The Court: Proceed with your cross-examination.

20 Q. Now, what did Mrs. Blafer say to you when she got there? A. Because we didn't give her a check in advance for the delivery of the sugar she couldn't deliver the sugar, or, rather, her husband couldn't deliver it, and "Here is your deposit back," and she threw it on the table.

Q. And she handed you that check for \$150, did she not? A. She did not, sir.

Q. What did she do with it? A. She threw it on the table.

Q. In front of you? A. Well, certainly not in back of me.

30 Q. Well, now, can you not answer my questions, Mr. Silberman? A. Yes.

Q. That will be easier. And it was this same Joseph Krasner check for \$150, was it not? A. Yes.

40 Q. Now, what did she do then? A. She threw the check down, turned around and walked out of the back door. I followed her and threw the check after her, told her the check was hers, not mine, shut the door and finished my lunch.

Isidor Silberman—Cross

Q. Did she go out of the back door? A. Yes.

Q. Did that enter into a back yard, or where did that lead to? A. Well, it does and it doesn't.

Q. Please do not fence; tell us. A. It does.

Q. It does? A. Yes.

Q. Lead into a back yard? A. Yes, you can go 10
into the back yard from that.

Q. Then you threw the check out in the back yard after her? A. No, sir.

Q. Well, what happened? A. The stairway is inclosed I threw it on the stairs, right at her.

Q. What do you say? A. I threw it at her; she was on the stairs.

Q. Then you threw it out on the stairway? A. Yes, sir.

Q. Is that the last you have seen of it? A. It 20
is, yes, sir.

Q. And you paid no further attention to it? A. No; it wasn't mine.

Q. Mr. Blafer on August 10, 1914, was a retail grocer in Prince Street, was he not? A. He was.

Q. What was his number in Prince street at that time? A. 128.

Q. And your employers, E. D. Depew & Company, were wholesale grocers in New York City? A. They were. 30

Q. Now, you have volunteered the statement, Mr. Silberman, that you thought there was no delivery of the hundred barrels of sugar by Mr. Blafer to Edward D. Depew & Company in New York City. How do you know that? A. Well, if they had delivered the sugar we wouldn't sue.

Q. I did not ask you that; I am asking you how you know that? A. Because of this suit.

Q. And that is the only reason you know that? A. Yes. 40

Isidor Silberman—Re-direct

Q. Then you volunteered the statement to the Court and jury that you knew there was no delivery of this hundred barrels of sugar merely upon an inference drawn from the fact of this suit being pending? A. Would we sue if we had received it?

10 Q. I am not arguing with you, Mr. Silberman; I am asking you questions. Mr. Boardman will attend to the argument. Now, will you answer the question? A. If you will repeat it.

Mr. Macdonald: The stenographer will repeat it.

Q. (Question read as follows: "Then you volunteered the statement to the Court and jury that you knew there was no delivery of this hundred
20 barrels of sugar merely upon an inference drawn from the fact of this suit being pending?") A. Yes.

RE-DIRECT-EXAMINATION by Mr. Boardman:

Q. Mr. Silberman, when you use the pronoun "I," "I did so and so," "I bought," and so on, do you mean personally or as representative? Objected to.

30 A. As representative.

Mr. Macdonald: I object, first, that the question is leading, and in the second place, it is not cross-examination, and, in the third place, it is entirely inadmissible and irrelevant. The witness's testimony will speak for itself; at least, I hope so.

Mr. Boardman: Well, I will modify the form of it.

Q. Explain the use of the word "I." A. When
40 I say, "I" I mean—

David Schleier—Direct

Mr. Macdonald: I object to that. The word "I" does not require an explanation before an English Court and jury. It is not a technical term or a foreign term, and I object to it.

The Court: The objection is overruled. Defendant's counsel pray an exception to this ruling of the Court. 10

Exception noted as ground of appeal.

Q. Explain your use of the word "I." A. When I say, "I," I mean for the firm. It is understood that I didn't buy that sugar for myself.

Mr. Macdonald: I move that that answer be stricken out, or the part of it where the witness volunteered that "It is understood that I did not buy the sugar." 20

The Court: I will allow it to stand.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

DAVID SCHLEIER, sworn in behalf of plaintiff (through the Yiddish interpreter.) 30

Direct-examination (through the interpreter) by Mr. Boardman:

Q. Mr. Schleier, where do you live? A. 98 Holland street.

Q. What is your business? A. Grocer.

Q. What position in the grocery business, what work do you do? A. I am doing the selling of the groceries. My brother has the grocery; I am there with my brother. 40

David Schleier—Direct

Q. Who is your brother? A. Samuel Schleier.

Q. Where is his place of business? A. He is together with me in the same place.

Q. In Holland street? A. Yes, sir.

Q. What was your business in August, 1914?

10 A. I worked for Samuel Blafer.

Q. Do you remember a day when Mr. Silberman came into Mr. Blafer's place in August, 1914? A. Yes, sir.

Q. Who else was there? A. Sam, Sam's wife and I was there.

Q. What happened? A. Issy Silberman went over to Samuel and asked him if he wants to buy sugar; Silberman wanted to buy sugar.

20 Q. What did Blafer say? A. He said, "All right."

Q. And what did Silberman say then? A. Silberman said, "It is all right; we will agree to the price;" and they argued about it.

Q. I show you a paper that has been marked Exhibit P-1 (paper shown to witness.) Did you see that paper signed? Look at it? A. I saw Silberman give a paper to Samuel, that he shall sign it, but he can't read English.

30 Q. So what was done? A. He took the paper and handed it to his wife.

Q. And what did he say? A. Samuel Blafer said to his wife, "Take this contract and sign it."

Q. Did she sign it? A. She signed it and handed it back to Sam.

Q. And what did he do with it? A. Sam took it and gave it to Silberman.

40 Q. Here is a paper that has been marked Exhibit P-2 (paper shown to witness.) Look at that paper. A. I see it.

David Schleier—Cross

Q. Did you see that paper signed? A. Silberman took out a check and gave it to Sam; at the same time he took out a paper and he wanted that paper to be signed. He handed it to his wife and she signed it.

Q. And what then, what did she do? A. Then Silberman left. 10

Q. Did you see a check? A. I did see a check.

Q. Who handled the check? In whose hands did you see a check? A. I saw the check in Sam's hands; I saw Silberman handed the check to Sam.

CROSS-EXAMINATION by Mr. Siff:

Q. Are you telling us the full truth of what you know about this matter? A. Yes, sir. 20

Q. Do you write English? A. I don't read it; I can only sign my own name.

Q. Is that your name (paper shown to witness?) A. Yes, this is my name.

Q. Do you recall when you signed this? A. Yes.

The Court: What is the paper you have shown the witness?

Mr. Siff: A statement signed by this witness as to the facts.

The Court: I merely want to know what it is. It is a paper not yet introduced? 30

Mr. Siff: Yes, sir.

Paper identified by witness marked D-2 for identification.

Q. When did you sign this paper? A. It was on a Sunday.

Q. What Sunday did you sign this paper? A. It was on the last Sunday—it was a Sunday 40

David Schleier—Cross

after the holidays. What Sunday it was I can't tell you, but I know it was on a Sunday.

Q. Was it a week ago? A. A week or two; I don't remember.

10 Q. Do you remember what it says in this paper? A. No.

Q. Do you remember what was said to you when you were asked to sign this paper? A. Yes, I do.

Q. Was there anybody else present besides myself and yourself when this paper was signed? A. There were customers in the store.

Mr. Boardman: If your Honor please, I object to this being carried further without our seeing and knowing what the paper is.

20

The Court: I see no objection to the testimony thus far.

Mr. Boardman: Even the witness disclaims knowledge of its contents.

Mr. Macdonald: No, he has not.

Q. Was there anyone else present besides yourself and myself when this paper was signed? A. My brother was there. Samuel Blafer and other customers were there, too.

30 By the Court: Q. Your brother? A. Yes, my brother.

Q. What was his name? A. Samuel Schleier.

By Mr. Siff: Q. Do you remember a fellow by the name of Trotler?

The Court: Was the gentleman who has been examining you there?

Q. Was I there? A. Sure, you were there.

40 Q. Was Mr. Trotler there? A. Mr. Trotler wasn't at that time.

David Schleier—Cross

Mr. Boardman: If your Honor please, it does not appear that any representative of the plaintiff was there.

Q. Was there a party there—Trotler's son?

A. Trotler's son wasn't inside, but he was called in from outside on the street.

Q. Who called him in from the street? A. You yourself. 10

Q. And what did Trotler do when I called him in? A. You called him in and handed him that paper, he shall read it.

Q. Did he read it to you? A. Yes, he read it in English.

By the Court: Q. Mr. Trotler read it? A. Mr. Trotler did, yes, your Honor.

By Mr. Siff: Q. What is Mr. Trotler's first name? A. About himself, I know his first name, but I don't know about his son's first name. 20

Q. Where does his son live? A. He lives with his father.

Q. Where does he live now? A. I don't know.

Q. Now before I called in Mr. Trotler did I read this paper to you? A. Yes.

Q. And after Mr. Trotler had explained the contents of it you signed it?

Mr. Boardman: I object to that question if your Honor please. 30

The Court: The question assumes something that I do not think is proved. I do not think it appears that Mr. Trotler explained the contents to him. Mr. Trotler read it in English.

Q. Did Mr. Trotler translate to you in Yiddish, or tell you in Yiddish, what he told you in English this paper contained, or meant? 40

David Schleier—Cross

Mr. Boardman: I object to the question. I do not see how he can tell.

The Court: It is a little complex, I think, the witness not understanding English.

Q. Mr. Trotler read this in English? A. Yes, sir.

10 Q. And as he read it in English did he tell you in Jewish what that which he was reading meant? A. No.

Q. He did not tell you what he was saying meant? A. No, he didn't say anything.

Q. Well, what did Mr. Trotler do, simply read it to you in English? A. He only read it in English.

Q. Did you understand it? A. No, sir.

20 Q. You did not understand what he was saying to you? A. No.

By the Court: Q. Where was this? A. In my store.

By Mr. Siff: Q. Now, before Mr. Trotler called did I read this affidavit to you and explain to you in Yiddish what this affidavit meant? A. No, you only wrote it down, and you read it to me in English, but I didn't understand.

30 Q. Then your testimony is that I did not explain to you in Jewish what this meant? A. No.

Q. Do you recall that after I had read this affidavit to you and explained to you in Jewish what this meant that you refused to sign it? A. No.

Q. And did you not say that you did not want to sign it because you did not know what was stated in the affidavit? A. Yes.

40 Q. And did I not thereupon call in a young man, whom I did not know at all—

David Schleier—Cross

The Court: The witness could hardly know that.

Q. Well, did I not call in a young man who was standing in front of your store and ask him to read and explain to you what was contained in this paper? A. Yes, you called in the man, but he didn't explain to me in Yiddish. 10

Q. In what language did he explain it to you? A. He read it in English.

Q. And was he addressing you while he was reading it? A. No.

Q. Did he read it a'oud? A. He read it himself and 'quick.

Q. And then you signed it? A. May I say how the thing happened?

Mr. Siff: Your counsel will bring that out. 20

The Court: You may answer questions. You are asked if you signed it?

Q. And then did you sign it? A. Yes.

Q. And you swear that what was contained in this paper was true?

Mr. Boardman: I object. I do not think that is a fair question, in view of the foundation that has been laid.

The Court: Well, the question is not now as to the contents of the paper, but he swore to it. 30

Mr. Boardman: He went through the form of swearing.

The Court: The question is not improper.

Q. Did you swear that what you had signed your name to was true upon my question? A. I only signed it; I didn't swear. 40

David Schleier—Cross

Mr. Siff: I would like to offer this in evidence, your Honor.

The Court: Do you think it is yet evidential? It is marked for identification. You could not offer it now, anyway. All you can do is to mark it for identification.

10 Q. Do you recall that about a year ago or less I called to see Mr. Blafer at Prince Street? A. I can't remember that.

Q. Do you remember that you were called to come up to Mr. Blafer's home, across the street from the store? A. No.

20 Q. You recall no interview about a year or so ago at which I was present, Mr. Blafer was present and his wife was present at which I asked you concerning this transaction?

Mr. Boardman: I object, your Honor, on the ground that whatever communication may have passed between this witness and the Blafers, without the presence of any of the plaintiff's representatives, at a time which has not been more definitely fixed, is immaterial to bind the plaintiff.

30 The Court: I assume that the examining counsel is trying to lay a foundation for the purpose of contradicting the witness. All that you are required to do is to be definite as to the time and place. To what extent you have covered that I am not quite sure. Be as definite as you can.

40 Q. Do you recall that last winter you were called to the home of Mr. Blafer, at 125 Prince street, where he lived, and you were there asked by me what you knew about the transaction in question? A. No.

David Schleier—Cross

Q. Do you recall ever having seen me at any time before a week ago Sunday, when you signed this paper? A. I can't tell you; I don't know.

Q. How do you recall that this transaction occurred in the month of August, 1914? A. I know; it happened.

Q. You remember clearly, do you, what conversations took place? A. Yes. 10

Q. Very clearly? A. Yes.

Q. What time did Silberman call? A. It was before noon, around ten or twelve o'clock, before noon.

Q. Can you not tell us a little more definitely when it was, whether it was ten or twelve? A. I can't tell you.

Q. What was your occupation, what were your duties? A. Attended to the customers. 20

Q. Were you waiting on any customers when Silberman came in? A. No, sir.

Q. What were you doing when he came in? A. When Silberman came in and started to talk I was right alongside of him, and I heard it.

Q. Is this the paper which Mr. Blafer signed? A. Yes, that is the paper.

Mr. Siff: I offer that for identification.

Paper marked D-3 for identification.

Q. Is this the paper that Mr. Blafer signed (paper shown to witness)? A. I don't know about the paper; I know the signature. She signed it; I know that she signed it. I couldn't recognize her signature. 30

Q. Then you merely recognize her signature; you do not know whether she signed that paper or that paper (indicating?) A. He handed her a book and she signed it. 40

David Schleier—Cross

Q. Answer the question, please. You do not know whether she signed this paper or that paper, or what paper it was?

10 The Court: Let me make a suggestion, Mr. Siff. It would be quite difficult on reading this testimony to understand what you mean by "this paper" and "this paper." Please designate them in some way.

Q. You do not know whether she signed the paper marked "Exhibit P-1," in evidence, or whether she signed the paper D-3 for identification (papers shown to witness?) A. She was handed a book and she signed. Whether it was yellow paper or white paper I don't know.

20 Mr. Boardman: I think that is quite confusing to the witness, because it is quite evident that one of these is a mere carbon copy of the other. I object to the present line as tending to confuse the witness.

The Court: I do not consider it legally objectionable.

Plaintiff's counsel prays an exception to this ruling of the Court.

30 Exception noted as ground of appeal.

Q. As a matter of fact, you did not see her sign that receipt, did you—actually see her sign the receipt? A. Yes, I did see it.

Q. Have you ever spoken to Mr. Silberman about this matter? A. No.

Q. Did you ever speak to Mr. Boardman about this matter? A. I don't know Mr. Boardman.

40 Q. Did you ever speak to Mr. Depew about this matter? A. Never.

David Schleier—Re-direct

Q. Whom did you speak to about this matter?

A. Nobody.

Q. You never spoke to anyone about this matter except to me? A. Yes, to you I did.

Q. Where was Mrs. Blafer at the time? A. In the store.

10

RE-DIRECT-EXAMINATION by Mr. Boardman:

Q. Mr. Schleier, do you know what my name is? A. No, sir.

Q. Have you been in my office? Do you remember my face?

Mr. MacDonald: I object. I do not see any use of wasting time in that direction.

The Court: I see no objection to the inquiry.

20

Q. Do you remember my face? A. Yes.

Q. Have you been in my office? A. Yes.

Q. When you came to my office who was with you? A. Mr. Silberman.

Q. In my office could you speak to me—did you speak to me?

Mr. MacDonald: I object. If the Court please, I do not see how this can possibly be relevant or permissible.

30

Mr. Boardman: I am simply after the language.

The Court: I think it is entirely unobjectionable.

A. No.

Q. Why not? A. Well, I can't speak English.

Q. While you were testifying you were asked if you could explain about your signing that yellow paper, D-2 for identification (paper shown to wit-

40

David Schleier—Re-direct

ness). Explain how you came to sign that. A. He came in and he asked me what I know about the case. I told him that I know that Silberman came in and bought sugar off Sam.

Q. Sam Blafer, that means? A. Sam Blafer.

10 The Court: Well, go on.

Q. What else do you know about it? A. That is all that I told him, and he put it on.

Q. And did you sign it? A. Yes. At first I didn't want to sign it; I told him I will take it to my brother—I will take it to another man what understands the language, and he will read it to me.

20 Q. And what then? A. Then he told me, "Nothing would happen to you; you dare sign it. Sign it." I had a dispute with him; I didn't want to sign it, and he said, "You take my advice and sign it." Blafer also told me to sign it. I know Blafer. I even now don't know what that is.

By the Court: Q. Who was it that advised you to sign it? A. The lawyer.

(By request of the Court, Mr. Siff arises.)

Q. This gentleman, do you mean? A. Yes.

30 By Mr. Boardman: Q. What did you mean, Mr. Schleier, when you testified that you did not talk to anybody about this except to Mr. Siff? What is your meaning?

Objected to.

Mr. Boardman: I think he is entitled to explain, if the Court please.

The Court: I think the form of the question is objectionable. The meaning is plain enough. But you may ask him any questions that occur to you for the purpose of explaining his answer.

Jacob Krasner—Direct

Q. Mr. Schleier, in some of your answers you have spoken of not speaking to anybody about this matter. Which matter did you mean? A. About the case.

10

JACOB KRASNER, sworn in behalf of plaintiff:

Direct-examination by Mr. Boardman:

Q. Mr. Krasner, where do you live? A. 271 Hunterdon Street.

Q. What is your business? A. Wholesale grocer.

Q. What was your business in August, 1914? A. Wholesale grocer. 20

Q. You deal in sugar, among other things? A. Yes.

Q. How long have you dealt in groceries? A. Sixteen or seventeen years.

Q. You are familiar with all aspects of the trade? A. Yes, sir.

Q. Do you remember in August, 1914, drawing a certain check to the order of I. Silberman? A. Yes, sir. 30

Q. Have you that check with you? A. No, sir.

Q. Have you inquired for it at your bank? A. No, sir.

Q. How often do you get returned checks from you bank? A. Sometimes in thirty days, sometimes in sixty days.

Q. How many times since August 10, 1914, have you got back the paid checks at your bank? A. I don't know how many times. 40

Jacob Krasner—Direct

Q. Well, about how many? A. Balanced my book in August.

Q. And what months since August?

Mr. Macdonald: August of what year?

Q. What year? A. 1915.

10 Q. What months besides have you had your book balanced? A. Before?

Q. Between August, 1914, and August, 1915? A. Well, I can't tell you.

Q. Well, how many times? A. Well, sometimes thirty days, sometimes sixty days.

Q. Seven or eight times? A. Well, I can't tell you, because I don't know how many times they balanced my book.

Q. About seven times? A. About six or seven
20 times.

Q. Has this check ever come back to you? A. No, sir.

Q. Did you ever see this check after you gave it to Mr. Silberman? A. No, sir.

Q. How much was it for? A. \$150.

Q. Do you know what Silberman did with it? A. Yes, sir.

Q. What did he do with it? A. He deposited it with Mr. Blafer.

30 Q. Do you know Mr. Blafer? A. Yes, sir.

Q. Have you seen him since that time? A. Yes, sir.

Q. Was anything said about the check? A. No, sir.

Q. Was anything said about your bank account? A. Only the next day of the sale I saw him.

Q. The next day? A. Yes.

40 Mr. Macdonald: I object to anything being said about this bank account. I do not

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see how it is possibly relevant to this issue. The witness said there was nothing said about this check by the defendant. Now, how can it be relevant whether they discussed anything about this bank account?

(Question and answer read.)

10

The Court: I will let the answer stand.

Q. What was said by Mr. Blafer about your bank account? A. What is that?

Q. What did Mr. Blafer say to you about your bank account?

Mr. Macdonald: I object, if the Court please. I do not see how it is material what Mr. Blafer said about this man's bank account. That is not in issue between these parties. He has already said that Mr. Blafer said nothing to him about this check which passed, or is alleged to have passed, between Silberman and Blafer. Now, how can it be material what Blafer said about the bank account as long as he did not say anything about this check?

20

The Court: I will receive the testimony. Defendant's counsel pray an exception to this ruling of the Court.

Exception noted as ground of appeal. 30

Q. What did Mr. Blafer say? A. Well, he told me he had got my check for \$150. That check will be good. I told him to go to the bank and try.

By the Court: Q. Do you mean that he asked you whether the check would be good, is that what you mean? A. Yes.

Q. And you told him to go to the bank and try? A. And try. 40

Jacob Krasner—Direct

By Mr. Boardman: Q. Was it good? A. Sure, it was good.

Objected to.

Q. And what did he say next? A. He says I should try the check shouldn't be good; I should
10 take out my money from the bank.

Q. He wanted you to take your money out? A. Yes.

Q. Did he say why? A. No, he didn't told me anything why.

Q. Did you take your money out? A. No, sir.

Q. There has been \$150 against the check right straight along? A. Oh, there is more than that.

Objected to.

Objection overruled.

20 Mr. Boardman: There is other evidence which I would like to bring out from this witness, if there is any occasion for it; namely, along the line of market price of sugar; but I notice that the answer of the defendant makes no defense along the line of market price, so that I presume they admit that—

The Court: I understand the question relates to what is alleged to be a definite contract as to the specified price.
30

Mr. Boardman: Yes, and now I wish to show the market price, indicating the measure of damages.

The Court: What is your idea of what the measure of damages would be?

Mr. Boardman: I think it is expressly provided in the Sales Act of 1907 that it should be the difference between the
40

Jacob Krasner—Direct

agreed price and the market price at the time when the—

The Court: What is the section?

Mr. Boardman: 66 and 67—67, subsection 3.

The Court: You may prove the market price. 10

Q. Mr. Krasner, you have already testified to your familiarity with the sugar market. What was the market price of sugar in the middle of August, 1914?

Mr. Macdonald: I object to that question as being vague and indefinite and uncertain.

Q. On the 15th day of August, 1914?

The Court: First qualify the witness a little more. 20

Mr. Boardman: Well, my view was that the initial questions have been asked of this witness did qualify him, if I might refer to them.

The Court: I think you had better go further in that line.

Q. Mr. Krasner, how long have you been in the wholesale grocery business? A. Seventeen years in this line of business. 30

Q. And how long have you been familiar with the buying and selling of sugar? A. All the time.

Mr. Macdonald: He has not testified that he was familiar with the buying of sugar. A wholesale grocer might not buy and sell sugar.

Q. Are you familiar with the buying and selling of sugar? A. Yes, I am buying and selling. 40

Jacob Krasner—Direct

Q. And how long? A. Well, the same, about fifteen, sixteen or seventeen years, all the time in the same line of business.

Q. Now, you are familiar with the general practices and usages of the wholesale sugar trade? A. Yes, sir.

10 Mr. Macdonald: Now, if the Court please, I think it is highly objectionable, and nobody knows it better than my friend, to lead the witness this way and put the words in his mouth. My friend knows that that is illegal and inadmissible, and, under the circumstances, it is peculiarly objectionable, and I protest against this sort of thing. I object to the form of the question.

20 The Court: I think it is a leading question. I sustain the objection.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Q. Mr. Krasner, what is the extent of your acquaintance with the sugar trade? A. What is that?

30 Q. How much do you know of the sugar trade, the wholesale sugar trade? A. What I know about the sugar trade?

The Court: Yes, what do you know about it?

Witness: Buying sugar and selling sugar.

Q. And to what extent? A. What extent?

Q. Yes, how much? A. To make something.

Q. Yes, but how much do you buy every day or every week? A. We buy every day and every week and every month.

Q. And you were buying in August, 1914? A. 40 Yes, we bought in August.

Jacob Krasner—Direct

Q. And selling in August, 1914? A. Selling, yes.

Q. Do you know about the custom as to delivery? A. Yes.

Q. The time of delivery? A. Yes, sir.

Q. When sugar is bought what is the usual time of delivery, the time allowed? 10

Mr. Macdonald: One moment.

A. Thirty days.

Objected to as indefinite.

Q. How much time is allowed for delivery on sales of sugar— A. Thirty days.

Q. —according to the practice and custom of the trade in Newark? A. Thirty days.

Q. And that was the custom in August, 1914?

A. Yes, sir. 20

Q. Do you know the market price of sugar at wholesale—

The Court: Will you specify the kind of sugar, Mr. Boardman?

Mr. Boardman: Granulated sugar, I believe, is called for by this contract.

Q. You knew in August, 1914, and September, 1914, the market price for granulated sugar at wholesale? A. Yes, sir.

Objected to as leading. 30

The Court: I do not think it is objectionable, considering the antecedent examination.

Q. What was the market price of sugar on August 15, 1914? A. \$7.50.

Mr. Macdonald: When, August 15th?

Mr. Boardman: That was the question.

Q. What was it on September 9th? 40

Jacob Krasner—Direct

The Court: What does that mean, \$7.50 for how much?

Witness: A hundred pounds.

10 Adjournd until tomorrow, Tuesday, October 5, 1915, at ten o'clock, a. m.

SECOND DAY

Tuesday, October 5, 1915.

Met pursuant to adjournment.

20 Present: Counsel as before stated.

JACOB KRASNER, resumes the stand in behalf of plaintiff:

Direct-examination (continued) by Mr. Boardman:

Q. Mr. Krasner, what is the custom as to delivery of sugar after it has been bought and sold, how long a time is allowed to deliver? I do not
30 mean to pay; I mean to deliver.

Mr. MacDonald: He has already answered that, if the Court please, yesterday; he said it was thirty days delivery in Newark.

The Court: Thirty days allowed for delivery, the witness said.

Mr. Macdonald: Yes, sir.

40 The Court: Do you wish to ask any more on that point?

Jacob Krasner—Direct

Mr. Boardman: I wish to clear up that point.

The Court: Proceed.

Q. What is the custom as to the time allowed for payment after delivery?

Mr. Macdonald: I object, if the Court please, because, if this were a contract at all, it speaks for itself, and any custom would not vary it. So it is irrelevant as to what any custom may be as to time of payment. The time of delivery must be relevant. 10

The Court: Exhibit P-1 contains, opposite the word "Terms," "2," with a per cent mark and a dash, "Ten Days," and above, opposite the heading "Shipping directions," "Factory shipment." How do you understand the words and figures "2 per cent, ten days?" What do you understand them to mean? 20

Mr. Boardman: I understand that to mean that if payment is made within ten days after delivery that the purchaser is entitled to two per cent discount.

The Court: Yes, I should think that is probably what it does mean. 30

There are various provisions in the Sales Act as to times of payment. Section 41 says: "It is the duty of the seller to deliver the goods, and of the buyer to accept and pay for them, in accordance with the terms of the contract to sell or sale." Section 42: "Unless otherwise agreed, delivery of the goods and payment of the price are concurrent conditions, that is to say, the seller must be ready and willing to give 40

Jacob Krasner—Direct

10 possession of the goods to the buyer in exchange for the price and the buyer must be ready and willing to pay the price in exchange for possession of the goods." Section 43: "Whether it is for the buyer to take

20 possession of the goods or for the seller to send them to the buyer, is a question depending in each case on the contract, express or implied, between the parties. Apart from any such contract, express or implied, or usage of trade to the contrary, the place of delivery is the seller's place of business, if he have one, and if not his residence but in case of a contract to sell or a sale of specific goods, which to the

30 knowledge of the parties when the contract or sale was made were in some other place, then that place is the place of delivery. Where by a contract to sell or a sale the seller is bound to send the goods to the buyer, but no time for sending them is fixed, the seller is bound to send them within a reasonable time." There may be some other provisions, but those seem to be the principal ones.

30 The question, as I understand it, is whether there is a usage of trade—by which is meant not merely some man's custom, but a general, prevalent and well recognized course of dealing—in respect to the payment for goods sold such as are said to have been sold. The question is objected to.

40 It seems to me to be a proper question. I will overrule the objection.

Jacob Krasner—Direct

Defendant's counsel pray an exception to this ruling of the Court.

Exception noted as ground of appeal.

The Court: Let the witness understand what you mean by "a custom." It does not mean his custom; it means everybody's custom. 10

Mr. Boardman: Yes, the trade custom. (Question read.)

The Court: I think your question is objectionable in one respect. It assumes that there is a custom. The witness ought to be asked if he knows whether there is a custom, and the question ought to define what is meant by "custom." If the witness says that he does know, then you can ask him what he knows. 20

Q. Mr. Krasner, do you know whether there is a custom of the trade as to the time of payment after delivery? A. Ten days, two per cent—

The Court: Do you know? Yes or no. Do you know?

Q. Do you know? A. Yes, I know it.

Q. What is, then, the custom of the trade as to the reasonable time for payment after delivery?

A. Ten days. 30

Q. And is there a custom as to discount?

Objected to.

The Court: What I have said as to the time for payment, I think, applies to this question.

Defendant's counsel pray an exception to this ruling of the Court.

Exception noted as ground of appeal. 40

Jacob Krasner—Direct

The Court: You may answer the question.

(Question read.)

A. What did you want to ask me?

Q. Is there a custom as to discount? A. Yes.

10 Q. What is the custom in the sugar trade as to discount? A. Two per cent.

By the Court: Q. Just what do you mean by "Two per cent?" A. Ten days cash, net cash.

Mr. Macdonald: Ten days, net cash, do you say?

Witness: Cash is ten days, two per cent.

Mr. Macdonald: What do you mean by "Net cash?"

Witness: I didn't say "Net cash;" I said,
20 "Cash, two per cent."

(The stenographer reads the former answer of the witness, as follows: "Ten days cash, net cash.")

Q. Is there a custom as to the time of payment without discount? A. Thirty days.

The Court: You are now speaking of payment, I suppose?

Mr. Boardman: As to payment.

Witness: Payment.

30 Q. What is the meaning of the words "Factory shipment"? A. What is the meaning?

Q. Yes. A. They ship direct from there, from the factory.

Q. When there is to be a factory shipment what is a reasonable time for the seller to deliver to the buyer? A. Thirty days.

The Court: One moment. You appear
40 to be asking the witness for his own individual opinion.

Jacob Krasner—Direct

Q. Are you acquainted with the custom of the trade as to the time for delivery of the goods, when the sugar is to be passed over to the buyer? A. Yes.

Q. What is the trade custom in the sugar trade as to how soon the sugar must be passed over to the buyer—delivered to the buyer? A. When the customer wants it. 10

Mr. Macdonald: What is that?

Witness: Any time the customer wants the delivery.

Mr. Macdonald: Any time the customer wants? (Answer read.)

Q. It need not be thirty days?

Objected to as leading.

(Question read.)

The Court: That seems to be a leading suggestion. I sustain the objection. 20

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Q. Mr. Krasner, yesterday, as I remember your testimony, you said that the custom of the trade as to delivery of sugar was thirty days?

The Court: Yes, he said that; "Thirty days allowed for delivery" was the language of the witness. 30

Q. What do you mean by "delivery"?

Mr. Macdonald: I object. I object on the ground that the word "delivery" is a plain English word. It is defined not only in the dictionary, but it is defined in law. It has a well settled meaning, and it is not admissible before the jury for a witness to 40

Jacob Krasner—Direct

climb out of a hole by putting some meaning of his in on a well settled—

The Court: The objection is overruled. Answer the question.

Defendant's Counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Q. What did you mean by the word "delivery"? A. Well, you asked me yesterday about delivery from the refinery is thirty day's time—from the factory.

Q. Have you anything further to say about your meaning of the word "deliver"? A. Yes.

Q. What further? A. About the word "deliver"?

20 Q. What is that?

The Court: Well, how much time is allowed to deliver from the refinery?

Witness: From the refinery to the buyer?

The Court: I am using your own language. You said thirty days' time was allowed for delivery.

Witness: Thirty days' time.

The Court: And that is what you had in your mind when you answered that question yesterday?

30 Witness: Yesterday?

The Court: You said yesterday that thirty days was allowed for delivery.

Witness: From the factory to the customer.

Q. Mr. Krasner, do you know the defendant, Samuel Blafer? A. What is that?

Q. Do you know the defendant, Sam Blafer? A. Yes.

40 Q. Do you know whether he bought or sold any

Jacob Krasner—Direct

sugar in August 1914, besides the sugar in question?

Objected to.

A. Yes, sir.

Mr. Macdonald: One moment. Do not answer questions when an objection is made. I object to that, if the Court please. 10

The Court: I did not hear your objection before the answer. If the witness anticipated your objection, your objection will be entertained, of course.

Mr. Macdonald: My objection was made immediately upon the question being asked and the witness anticipated, and his answer was simultaneous with my objection. If need be, in addition to my objection, I 20 move that the answer be stricken out. The question, I submit, is objectionable as being irrelevant to this issue, this issue being based upon a single contractual transaction which has been reduced to writing, and it is entirely immaterial and irrelevant, therefore, whether the defendant indulged in other transactions or not.

The Court: What do you say to that?

Mr. Boardman: Well, it appears to me 30 to be quite relevant, in view of the defendant's opening, indicating that the defendant is a small dealer in Prince Street. I think it becomes very relevant to show that he dealt to some extent.

The Court: It seems to me to be irrelevant. I suppose a small dealer in Prince Street has a right to sell anything that he can find a purchaser for and deliver. I sustain the objection. 40

Jacob Krasner—Direct

Mr. Macdonald: And the Court will also strike out the answer to the question?

The Court: Yes, I will strike the answer out.

10 Plaintiff's counsel pray an exception to this ruling of the Court.

Exception noted as ground of appeal.

Q. Mr. Krasner, is there more than one custom of the trade as to delivery of sugar? A. Yes, sir.

Q. What different customs are there as to delivery? A. I don't understand what you mean.

Q. Did you understand the other question? A. The other question; yes, sir.

Q. And you say there are more than one? You said yes. A. Yes, sir.

20 Q. Now, what are the customs as to delivery? You testified to one custom. Now, what other custom is there? A. Just the same.

Q. Well, is there more than one custom?

Mr. Macdonald: He said it is just the same.

The Court: The question is not an improper one.

Q. Is there more than one custom of the sugar trade as to delivery?

30 Mr. Macdonald: If the Court please, my objection was not directed to the form or nature of the question, but to the fact that the witness has already answered the question, and now counsel is attempting to prod him and suggest to him that counsel wants some other different kind of an answer, which is leading the witness simply
40 by suggestion, that is all.

Jacob Krasner--Cross

The Court: It is an everyday occurrence, Mr. Macdonald, for counsel who is examining a witness to inquire as to the meaning of answers which he has given, in order to show that the witness is correctly understood. Therefore, I think this question is quite proper. It is, substantially, are there different customs? 10

Q. Are there different customs of the sugar trade as to delivery, or is it all one custom? A. Well, there is some people buy for thirty days; some people might buy for a week; some people buy for a day.

By the Court: Q. Well, that is not what makes up custom. That depends on the bargain, does it not? A. Yes. 20

Q. The custom that we are inquiring about is a general usage throughout all the trade, which regulates the matter and which everybody follows. Now, you have told us that there is a custom that the factory has thirty days to deliver to the customer? A. Yes, sir.

Q. You say that is a custom? A. Yes, that is a custom.

Q. If nothing is said about it—A. That is a jobber. 30

Q.—that is what is done. Now, Mr. Boardman wants to know if there is any other custom which people follow except that, so far as you know. A. Well, I don't understand that.

CROSS-EXAMINATION by Mr. MacDonald:

Q. Mr. Krasner, I understood you to say that you are a wholesale grocer? A. Yes, sir.

Q. Are you also a retail grocer? A. No, sir. 40

Jacob Krasner—Cross

Q. Wholesale alone? A. Wholesale alone.

Q. Are you in partnership? A. No, sir.

Q. Where is your warehouse? A. Two hundred seventy-one Hunterdon Street.

Q. And is that also where you live? A. Yes, sir.

10 Q. Is that a frame house or a brick house or a stone house? A. Frame house.

Q. And how many rooms? A. How many rooms I live?

Q. How many rooms in the house all together—how many stories? A. How many stories? Two.

Q. Two stories? A. Yes.

Q. And which story do you live in? A. Which I live in?

Q. Yes. A. The second.

20 Q. The second story? A. Yes.

Q. And you carry on your wholesale grocery business on the first floor? A. On the first floor? We got a warehouse.

Q. You got a warehouse on the first floor? That is what you meant, was it not? A. Yes.

Q. The warehouse on the first floor? A. Yes.

Q. And how wide is that building, 20 feet? A. I don't know.

Q. Do you not know how wide it is? A. No.

30 Q. It is your building, is it? A. It is my building.

Q. How wide is the lot? A. Well, I can't tell you how wide the lot is.

Q. You do not know? A. No.

Q. How deep is the lot? A. I think about 125.

Q. How deep is the building? A. Well, I don't know how deep is the building; I didn't measure.

40 Q. You do not know how deep the building is

Jacob Krasner—Cross

and you do not know how wide the building is?

A. No.

Q. You do know that you carry on a wholesale grocery business there? A. Yes, sir.

Q. Now, you say you know Sam Blafer, the defendant? A. Yes, sir.

10

Q. A year ago last August he was a retail grocer, was he not, in Prince Street? A. Sam Blafer? Yes, sir.

Q. And he had a little store there in Prince Street where he carried on the retail grocery business? A. Yes, sir.

Q. Now, you have told the Court and jury that you are familiar with the customs in the sugar trade. Do you buy sugar yourself personally or do you have a buyer? A. I got a buyer.

20

Q. You have a buyer? A. Yes, sir.

Q. And this buyer attends to the buying of the sugar for you, does he not? A. Yes, sir.

Q. And the buyer is the man who keeps posted as to the customs of the trade and also as to the market prices? A. Yes, sir.

Q. And where is the buyer? Is he associated with you up there or is he in New York? A. He is in New York.

Q. He is known as a sugar broker, is he not? A. A sugar broker; yes, sir.

30

Q. And in the wholesale sugar business is it not a fact that sugar is not bought direct from the refinery, but is bought through sugar brokers? A. He buys direct from the refinery.

Q. The broker buys direct from the refinery? A. From the refinery.

Q. Yes, undoubtedly, but what I mean is this: The wholesale grocer, or any ordinary purchas-

40

Jacob Krasner—Cross

er of a large amount of sugar, always buys through a broker, does he not? A. Through a broker.

Q. And these sugar brokers are all in New York City, are they not? A. They are all in New York
10 City.

Q. Is there a sugar broker in Newark? A. No, sir.

Q. Is there a sugar refinery in Newark? A. No, sir.

Q. So that, then, in the wholesale trade, when you want to buy sugar in any quantity you go to a sugar broker in New York City and buy it through him? A. We buy it through him from the refinery.

20 Q. Yes, you buy it through the broker from the refinery? A. From the refinery.

Q. Now, is there any difference in the trade as to custom between the wholesale trade and retail trade? A. No, sir.

Q. Is there not? A. That is a difference, if the retail trade buys twenty-five barrels he gets the same price.

Q. I am speaking of the retail trade now. The retail grocer handles sugar in small lots; he sells
30 it three and a half pounds or seven pounds or fourteen pounds, whatever the case may be? A. Yes.

Q. Which are divisibles of 112 pounds; isn't that true? A. Yes.

Q. It is three and a half, seven, fourteen, twenty-eight? A. Yes, sir.

Q. And so on up to 112 pounds? A. Yes, sir.

Q. And 112 pounds is a hundredweight, is it
40 not, in the sugar trade? A. The sugar trade is

Jacob Krasner—Cross

one hundred pounds; they sell by the hundred; they don't sell by the 112 pounds.

Q. They sell by the hundredweight, do they not? A. Yes, sir.

Q. By the hundredweight? A. Yes, sir.

Q. Now, what I ask you is this; In the sugar trade is not a hundredweight 112 pounds; isn't that right? A. One hundred twelve pounds, yes. 10

Q. Yes, 112 pounds; that is a hundredweight in the sugar trade, and that is the reason that the grocers in selling sugar sell it in divisibles of 112, such as three and a half, fourteen, twenty-eight, and so on; it is made up in small bags which together make up 112 pounds, or a hundredweight; isn't that right? A. No.

Q. Well, now, is it not a fact that in the retail trade the custom is to sell sugar at three and a half pounds or seven pounds? A. Three and a half pounds, seven pounds. 20

Q. Isn't that right? A. Yes, sir.

Q. Well, we are agreed perfectly, so far. Now, in this memorandum which we have here, where it says "Factory, shipment" that means the refinery, does it not? A. The refinery, yes.

Q. "Factory" means the refinery? A. The refinery. 30

Q. That is the only factory where they make sugar? A. Yes, sir.

Q. And you say the custom where sugar is bought in large amounts, wholesale amounts, "Factory shipment" means thirty days' time for delivery; that is right, is it not? A. Well, sometimes thirty days and sometimes fourteen days, whatever they agree. 40

Jacob Krasner—Re-direct

Q. Well, they can agree if they choose, to a different time. That is what you mean, is it not?

A. They agree on the contract.

Q. Yes, they agree in the contract, and then the contract determines what they agree? A. What they agree.

RE-DIRECT-EXAMINATION by Mr. Boardman:

Q. Mr. Krasner: if the contract does not tell the time for delivery, what is the trade custom?

Objected to.

A. Thirty days.

Mr. Macdonald: One moment.

Mr. Boardman: That is the same as he has testified.

(Objection withdrawn.)

Q. Mr. Krasner, does a hundredweight of sugar have different meanings in connection with different shippers? A. No, sir.

Q. Does a hundredweight always have the same meaning in the sugar trade? A. The same meaning, a hundred pounds.

Q. How many? A. A hundred pounds; there is a bag for a hundred pounds of sugar.

Q. How many pounds are in a barrel in the sugar trade? A. How many pounds is in a barrel?

Q. Yes. A. Well, sometimes 350, sometimes 360 and sometimes less five pounds. You can't tell; it isn't every barrel the same way.

Q. What is the most customary, or most usual, capacity of a sugar barrel, or a barrel of sugar?

Mr. Macdonald: I object. The witness has already said that he cannot tell. That means, of course, that he does not know,

Jacob Krasner—Re-direct

and therefore he is not qualified to answer any such question as that. There are millions and millions of barrels of sugar shipped and sold.

The Court: The objection is overruled. You may answer the question.

10

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Q. What is the most usual? A. Well, 350.

Q. If a sugar transaction is made and the price is named at five, ten, what does that mean? A. Five dollars and ten cents a hundred.

Q. Mr. Krasner, you testified yesterday to the market price of sugar on August 15, 1914. Now, I ask you the market price of sugar on September 9, 1914. A. Well, I can't remember very good but between \$7 and \$7.75; I can't remember exactly the price.

20

Q. Do you know how the price of sugar ranged between August 10th and September 9th?

Mr. Macdonald: I object. It is immaterial how it ranged.

The Court: You may answer the question yes or no. I will overrule the objection.

30

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Q. Do you know? A. Yes, sir.

Q. How did the price of sugar range?

Mr. Macdonald: I object to the question as being immaterial and irrelevant.

The Court: The objection is overruled.

40

Jacob Krasner—Re-direct

Defendant's counsel pray an exception to this ruling of the Court.

Exception noted as ground of appeal.

Q. How did the price of sugar range? A. Not cheaper than \$7.50.

10 Q. And how high did it go? A. Seven dollars and seventy-five cents.

By the Court: Q. Mr. Krasner, you told us yesterday that you drew a check? A. Yes, sir.

Q. For how much was that check? A. For \$150.

Q. Where did you draw it, where were you, at what place? A. At what place?

Q. Yes. A. Manufacturers' National Bank.

Q. Do you remember on what day? A. No, I can't remember what day.

20 Q. What did you do with it when you had drawn it? A. I beg your pardon.

Q. What did you do with it when you had drawn it? A. Well, I gave it to Mr. Silberman.

Q. At the bank? A. No, I gave it to him at my house.

Q. On the same day that you drew it? A. On the same day.

30 Q. Did you draw it because Mr. Silberman asked you to draw it? A. He asked me; he asked me for a check for \$150, and I make him out a check for \$150.

Q. On what day did he ask you? A. On the same day I gave him the check; I don't remember the date exactly.

Q. Where were you when he asked you to draw it? A. In my house.

40 Mr. Boardman: If your Honor please, I think the witness may have misunderstood your question about what place he drew it,

Jacob Krasner—Re-direct

thinking that it was referring to the check.

The Court: I see.

Q. Then Mr. Silberman came to your house? A. Yes.

Q. And asked you to draw a check? A. He asked me I shall give him a check for \$150, I shall give him a check, and I gave him a check. 10

Q. Where were you when he gave it? A. At my house.

Q. It was on the Manufacturers' National Bank?

A. The Manufacturers' National Bank made out on the Manufacturers' National Bank.

By Mr. Boardman: Q. Mr. Krasner, have you been paid back that \$150? A. Yes, sir.

Mr. Macdonald: One moment. It appeared from his own testimony that he never paid out \$150. How could he be paid back the \$150? I object to the question as being, first, an attempt to contradict the witness's own statement. 20

The Court: Do you know any rule that prevents counsel from contradicting his own witness? He cannot impeach him, but he can always contradict him.

Mr. MacDonald: That was only the first objection that I had. I do not rely upon that so much as the act that it is entirely irrelevant and immaterial to the issue whether Mr. Krasner ever got any money or not. That could not possibly bind Mr. Blafer, the defendant in this case. 30

The Court: I think it is irrelevant. The objection is sustained.

Abraham Cohen—Direct

ABRAHAM COHEN, sworn in behalf of plaintiff:

Direct-examination by Mr. Boardman:

10 Q. Mr. Cohen, where do you live? A. I live now 527 Bergen Street, private.

Q. Newark? A. Newark; yes, sir.

Q. What is your business? A. I used to be in the grocery business, but now I am private; I sold my place.

Q. What was your business in August, 1914? A. Retail grocery on 110 West Street, but after this I sold the place; just the time I sold the place, that time, 110 West Street, on August 10th.

20 Q. Do you know the defendant, Samuel Blaffer? A. Yes, sir.

Q. Have you had any business dealings with him? A. I bought sugar—

Mr. Macdonald: I object, if the Court please. How can it be relevant or material whether all the citizens of Newark had business with Samuel Blaffer? How can it affect a transaction which is reduced to writing between this wholesale grocery in New York and the defendant?

30 The Court: It may be merely introductory. I will allow it to be answered yes or no.

Witness: I don't know what was the question.

Q. (Question read.) A. Yes, sir.

Q. Did you have any business dealings with him in August, 1914? A. Yes, sir.

40 Q. What dealings did you have? Objected to.

Abraham Cohen—Direct

The Court: Now, what is it that you propose to show which is relevant to this case?

Mr. Boardman: Both the price at which sugar was sold and the fact that the defendant, Blafer, was in the business of buying and selling sugar on a wholesale scale, both of which I understand to be controverted by the defendant. 10

The Court: I think the last question is immaterial. I am not in the sugar business, and I suppose I could sell as many barrels of sugar, or as many hundred barrels of sugar, as I could find a purchaser for. If you desire to offer any further evidence as to the market value from this witness, it is competent for you to do that. 20

Q. Mr. Cohen, How long have you been dealing in sugar? A. The time when I was retail I used to buy sugar; not always sugar; anything my grocery needs; I bought sugar.

Q. What was the largest purchase of sugar you made? A. Sometimes, when I felt like buying, when I had money enough to buy, I could buy five barrels, ten barrels, according to how I feel like buying, and, you know, always the wholesaler used to give me a tip. Many times a salesman comes in the store; he gives me a tip how the market price is; not only sugar, but anything. He sees something goes up; he says, "Cohen, this goes up. You will save money to buy." The same thing with everything. 30

Q. What was the condition of the sugar market in 1914? A. Well, the price wasn't always the same; every day was a different price. 40

Abraham Cohen—Direct

Q. And how did it change, go up or down? A. It always went up; sometimes one day it went up as high as fifty cents on a hundred and more.

10 Q. Can you give the market price of sugar on the 15th of August, 1914? A. Well, the way I remember, sugar was \$7.50, \$7.75; that is what they said. I don't know exactly what it is; that is what I heard all around there saying, because I bought sugar at that time.

Q. Do you know the market price of sugar on September 9, 1914?

20 Mr. Macdonald: The witness has already said that he does not know. Now, how can the counsel attempt to qualify a little retail grocer, who has gone out of business, and attempt to qualify him as to prices in the wholesale market in New York City. The man says frankly that he does not know exactly. What is the use of wasting time?

The Court: The question now is asked if the witness knows the market price on a certain date in September. What is the date?

Witness: In September? I can't tell you.

30 The Court: Wait a moment.

(Question read.)

By the Court: Q. Do you know what the market price of sugar was on the 9th day of September, 1914? A. No, I can't tell you; I can't tell you what the price was at that time.

Q. You don't remember? A. I don't remember.

40 By Mr. Boardman: Q. Mr. Cohen, you need not answer this question until Mr. Macdonald has

Abraham Cohen—Direct

heard it. Have you bought any sugar of Samuel Blafer? A. Yes, sir.

Mr. Boardman: I did not mean for you to answer.

The Court: There is no harm done.

Mr. Boardman: Do not answer until Mr. Macdonald has heard the question. 10

Witness: All right.

Q. Have you bought sugar of Samuel Blafer in August, 1914?

Mr. Macdonald: I object to that. That is the same question that was overruled by the Court before as being irrelevant. Counsel knows that very well.

The Court: Well, I am not so sure about that. The witness was asked as to the market price, and gave it. Now, the question is whether the witness on further examination may state specific transactions at or about this time, and state the price at which those transactions were made, for the purpose of backing up his testimony as to what the market price was. Market price is a thing that is ascertained by a comparison of individual instances. Why may not a witness relate what his experience was from which he adduces, in part, at least, his conclusion as to what the general market price was? 20 30

Mr. Macdonald: Now if the Court please the witness was already asked what the market price was on August 15th, and he said, "I don't know exactly," and he was asked what it was on September 9th, and he said, "I can't remember." Now, the 40

Abraham Cohen—Direct

10 Court has already overruled the offer to prove some sort of dealings which this witness had, as being irrelevant to this issue. If he does not know what the market price was on August 15th and he does not remember what it was on September 9th, how can he remember what prices he paid, even if they are relevant and material?

The Court: It is not for the Court to say whether a witness can remember one thing or another.

Mr. Macdonald: He says he cannot.

20 The Court: The question is whether, the witness's attention being now directed to specific transactions, he has recollection of prices in those transactions at about that time. I think it is a perfectly proper question. I overrule the objection.

Defendant's counsel pray an exception to this ruling of the Court.

Exception noted as ground of appeal.

(Question read.)

A. Yes, sir.

Q. What day, as near as you can remember?

30 A. I don't remember. Around Thursday afternoon I came down in his place. There were two men there—

By the Court: Q. Can you tell us the day? A. Thursday afternoon, I think it was, the 14th.

Q. The 14th of—A. The 14th of August. I came down in the afternoon, and I see two men standing there buying sugar—

The Court: Never mind that. Wait for questions.

40

Mr. Boardman: Never mind that.

Abraham Cohen—Cross

By Mr. Boardman: Q. What price did you pay?

A. Six dollars and forty cents.

Q. How much did you buy? A. Fifty barrels.

Q. Why did you buy so much?

Objected to.

The Court: Do you think that is important? 10

Mr. Boardman: Well, I think it is important with regard to the state of the market at that time on one day as compared with another.

The Court: His intentions seem to me to be irrelevant. His actual transactions, I think, are competent. His reasons for making purchases I do not think will interest us. 20

Q. Did you make any other purchases of Samuel Blafer in August, 1914? A. No, sir; only sugar, I bought.

Q. Did Mr. Blafer deliver this sugar? A. Yes, sir. He didn't deliver, but I got it out myself. I bought on that condition: I shall take it out of the warehouse myself. But, still, I had the sugar on time. Whenever I felt like going down and getting the sugar out I had it.

Q. How long after that Thursday did you get the sugar? A. I couldn't tell you exactly how many days, but around ten days I had it out. 30

CROSS-EXAMINATION by Mr. Macdonald:

Q. Mr. Cohen, you are not now in business? You are living private, you say? A. Yes, sir.

Q. And you were a retail grocer? A. Yes, sir.

Q. And where did you carry on your business when you were a retail grocer? (No response.) 40

Abraham Cohen—Cross

Q. Where was your store? A. On the first time? When do you mean, what date, what year, did I have a store?

Q. At the time you went out of business. A. I was private.

10 Q. At the time you went out of business you were private, we understand? A. Yes.

Q. And you are now private? A. Yes.

Q. But when you sold out the last time and went private where was your store? A. The second store—I had two stores already—the second one, in Ridgewood Avenue now but the first time when I bought sugar I sold my store in West Street.

Q. Will you be kind enough—A. Well, I don't know what you asked me.

20 Q. When did you sell out last? A. The time when I bought the sugar?

Q. I am not asking you that. I am asking you when you sold out your business and went to live private? A. Last? A couple of weeks ago.

Q. Two weeks ago? A. Two or three weeks ago.

Q. Do you not know exactly? A. About three weeks ago, three weeks; it goes in the fourth week, because—

30 Q. I do not ask reasons. Was it in September? A. What month is it now, October? September; yes, sir.

Q. Last month? A. Yes, sir.

Q. Was it before Labor Day or after Labor Day? A. After Labor Day.

Q. How long after Labor Day? A. Well, it is three weeks since I sold it.

40 Q. Well, do you remember the date? A. The 10th of September, on the 10th.

Abraham Cohen—Cross

Q. Where was your store then, on the 10th of September? A. No. 9 Ridgewood Avenue.

Q. And how long had you had that store? A. Almost a year, about eleven months.

Q. Then you had that store in August, 1914?
A. I had it in West Street—no, I didn't have no store in 1914; I was private. 10

Q. You were living private in August, 1914? A. Yes, sir.

Q. All the month? A. More than this, more than a month, I lived private.

Q. More than a month? A. Yes, sir.

Q. When did you begin to live private in the summer of 1914? A. I lived around five months private.

Q. Well, when did that begin? A. Well, I got to figure out first from that date on. If you will give me time, I will tell you. 20

Q. Well, when did you buy this Ridgewood Avenue place? A. Eleven months ago.

Q. Well, was that in September, 1914? A. It was November.

Q. In November? A. November.

Q. November, 1914? A. Yes, November.

Q. In November, 1914? A. Yes.

Q. Then you had been out of business for five months before you went—A. Yes, sir. 30

Q. That would bring it back to, say, June, 1914?
A. Well, I will tell you. I didn't figure up how many months it is. Around four or five months.

Q. Well, was it before the 4th of July? A. It was in August; when I bought the sugar it was in August.

Q. Mr. Cohen, I am not asking you about when you bought sugar; I am asking you about when 40

Abraham Cohen—Re-direct

you went out of business in 1914. You say that you were out of business about five months; and that you bought this place up in Ridgewood Avenue in November, 1914? A. Yes, sir.

Q. Now, did you go out of business before the 4th of July in 1914? A. No, sir; after July—the end of July, then I went out.

Q. The end of July? A. Yes.

Q. And you were out of business from the end of July until some time—A. Until November.

Q. Some time in November? A. Yes, sir; around four months.

RE-DIRECT-EXAMINATION by Mr. Boardman:

Q. Did you buy sugar after you sold your place?

Mr. Macdonald: I object, if the Court please. It is not proper re-direct and it is irrelevant to this issue.

The Court: It seems to me to be both proper and relevant. I overrule the objection.

Defendant's counsel pray an exception to this ruling of the Court.

Exception noted as ground of appeal.

The Court: Answer the question.

(Question read.)

A. The last place or the first, what place do you mean?

Q. After you sold the first place. A. I didn't buy any more, only that sugar that I bought of Mr. Blafer. That sugar, I bought, fifty barrels; then I had it a long time; I used it for myself, and the rest I sold out to some stores.

Harry M. Davis—Direct

HARRY M. DAVIS, sworn in behalf of plaintiff:

Direct-examination by Mr. Boardman.

Q. Mr. Davis, where do you live? A. I live in Hackensack, New Jersey.

Q. Where is your business? A. In New York, 515 Canal Street. 10

Q. With what concern are you? A. E. D. Depew & Company.

Q. How long have you been with them? A. Twenty-eight years.

Q. What is the character of your position? A. I am the buyer and the manager of the salesmen.

Q. Did you hold such position in August, 1914? A. I did. 20

Q. What does Edward D. Depew & Company deal in? A. In the general wholesale grocery line.

Q. They deal constantly in sugar? A. Everything—yes, sugar and every other item that goes in the whole grocery business. There are thousands of items.

Q. Did you, in August, 1914, take up the market of sugar? A. Yes, I was buying sugar actively during August. 30

Mr. Macdonald: One moment. I do not see how it is relevant or material what this man did about the market.

The Court: Without understanding very distinctly what the objection is, I will overrule it.

Q. I understood you to testify that you had charge of the buying and had charge of the salesmen? A. Exactly, I did. 40

Harry M. Davis—Direct

Q. Do you know Isidor Silberman who has testified here? A. Yes, he is employed by my concern.

Q. Do you give him instructions? A. Yes.

10 Q. Did you give him any instructions regarding sugar early in August, 1914? A. I did.

Q. What instruction and how did you give it?

Mr. Macdonald: I object.

A. When he made his weekly visit to the office—

Mr. Macdonald: I object, if the Court please, that that is entirely immaterial to the issue, and that instructions given to an alleged agent, not in the hearing or in the presence of the defendant, are inadmissible upon this issue and cannot bind the defendant.

20

The Court: I will admit it for the purpose of showing the agent's authority.

Mr. Macdonald: Well, if the Court please, as I understand it, if we dealt with Mr. Silberman as agent we are estopped from denying his agency. That I understand to be the law, and therefore I do not see how it is relevant or admissible that, without our knowledge, or not in our presence, they may introduce alleged instructions to this alleged agent.

30

The Court: I have nothing further to add.

Defendant's counsel pray an exception to this ruling of the Court.

Exception noted as ground of appeal.

40 Mr. Boardman: Do I understand, Mr. Macdonald, that you admit the agency?

Harry M. Davis—Direct

Mr. Macdonald: I am unable to fathom counsel's mind as to what he understands.

Mr. Boardman: My present question is whether you admit or not that Silberman was an agent for Depew & Company?

Mr. Macdonald: My remarks were addressed to the Court, and I do not regard that they were a necessary admission in this case or any stipulation. I am not prepared to make any. 10

The Court: It is not necessary for you to make any admission. Proceed.

Q. (Question read as follows: "What instruction and how did you give it?") A. On Saturday afternoon, when Silberman came in the office for his weekly settlements— 20

Mr. Macdonald: I cannot hear you, Mr. Davis.

Witness: On Saturday afternoon, when Mr. Silberman came into our office for his weekly settlements, I talked the general condition of the sugar market abroad and in this country over with him, and I told him what I thought the prospects were for a much higher sugar market, with the European beet crop of sugar eliminated from the market, and told him that I found it impossible to obtain deliveries of sugar promptly from the New York refineries, and asked him if he knew of any of the trade in his territory who had sugar to sell, who could deliver the actual goods within a reasonable time, and he told me that there were some people that he thought he could buy sugar from among the smaller trade, and I told him that I would give him instructions by wire what to buy and what price limit I would 40

Harry M. Davis—Direct

authorize him to pay on Monday, and on Monday I sent him a telegram to buy any quantity he could buy at a price limit of \$5.30, or as much less as he could buy it, according to his buying ability. In the afternoon of Monday, he called

10 me up as a confirmation—

Objected to.

The Court: Never mind.

15 Q. Mr. Davis, you have spoken of Saturday and Monday. A. Yes.

20 Q. Can you give the days of the month? A. August 8th and August 10th.

Q. Of what year? A. Nineteen fourteen.

25 By the Court: Q. A price limit of five and what? A. A price limit of five-thirty, your Hon-
20 or.

30 By Mr. Boardman: Q. Are you familiar with the sugar trade? A. I am, sir.

Q. Are you familiar with the market price of sugar? A. I am, sir.

Q. Do you know what the market price was on the several days of August, 1914? A. Yes, I remember them very distinctly.

35 Q. What was the market price on August 11, 1914? A. August 11th the market was \$5.50 in
30 New York and \$6 in Philadelphia.

Q. What was it on August 12th? A. August 12th it advanced half a cent a pound; that made it six cents in New York.

Q. On August 13th? A. There were a number of prices made on August 13th, and the prevailing quotation in New York on the 13th was six
seventy-five, I should say. I have records which will show that with me.

40 Q. You have records with you? A. Yes, sir.

Harry M. Davis—Direct

Q. Just open them and produce them.

Mr. Macdonald: If the Court please, I do not know what my friend is driving at. He seems to be wanting to prove the daily fluctuations of sugar. I wish to make a general objection to that line of proof, as being inadmissible and irrelevant in this case and tending to confuse the issue. Assuming, for the sake of argument, that there might be damages, if the measure of damages be the difference between the contract price and the market price at the time when the sugar should have been delivered, why, then, the inquiry must be confined to the time of delivery, and it tends to befog the issue and confuse the minds of the jurors if we consider the price on other days, and therefore, I submit that it is not only irrelevant, but is confusing. 10 20

The Court: What date, Mr. Boardman, do you take to be the critical date, the date of the delivery?

Mr. Boardman: The date when delivery should have been made. I think that is the law in the Sales Act of 1907, and I submit that it is a part of that which would go to the jury as to what is the date on which the delivery in this case should have been made. 30

Mr. Macdonald: If the Court please, I would like to know what day my friend fixes upon.

The Court: What view do you take as to the dates which are to be considered in. 40

Harry M. Davis—Direct

case it becomes necessary to ascertain damages in this case? We have the date of the contract, of course.

Mr. Boardman: The date of the contract, August 10th.

10

The Court: Now, the date of delivery is another date. When do you understand that to be? What date do you understand that to be, under the evidence in the case?

Mr. Boardman: The date when the sugar should have been delivered? The sugar never was delivered.

The Court: Well, I want to get your view about it.

20

Mr. Boardman: August 18th, I think we shall be able to show. But it seems to me relevant to show the price of sugar on days earlier and days later than that, because if the defendant in his case shall be able to show that he could not have delivered it on the 15th, but could have delivered it on some other date, why, that would have a bearing on the time when the sugar should have been delivered, and for that reason, I desire to offer evidence of the market price of sugar day by day.

30

The Court: There may be some phases of this case to be hereafter developed which will make it convenient to know what this witness can tell us about the fluctuations of the market. I will therefore take the testimony, subject to Mr. Macdonald's objection, which I will overrule for the purpose of getting the testimony before

40

Harry M. Davis—Direct

the Court and jury for future consideration.

Defendant's counsel pray an exception to this ruling of the Court.

Exception noted as ground of appeal.

Q. Mr. Davis, what are these that you have before you? A. These are records of market reports and quotations made by the brokers acting for the New York refiners and Philadelphia refiners, covering our market; also telegrams covering the transaction in question before the Court. 10

Q. When is this issued? A. It is issued daily except Saturday.

Q. Will you open the report giving the market price for August 11th? 20

Mr. Macdonald: He has already given that; he has given the 11th and 12th and 13th.

Mr. Boardman: Very well.

Q. Will you turn to the report for August 14th? A. There is a mistake there. I was not asked about the 13th, the 10th, 11th and 12th were the dates that you asked me about.

The Court: Yes, we have your testimony as to the 10th, 11th, 12th and 13th. 30

Q. Now, the market price on August 14th?

Mr. Macdonald: We did not get his evidence as to the market price on August 10th; we got his evidence as to the limit to which he was willing to go: \$5.30.

The Court: Yes, you are right about that. The witness did not say what the market price was. 40

Harry M. Davis—Direct

Mr. Macdonald: I think you might as well, as long as you are going into it, get him to tell us what the market price was on August 10th.

10 Mr. Boardman: It was evidently unreasonable to expect delivery on the 10th, that being the date that the contract was made, if the Court please.

Witness: (Referring to paper.) On the 10th of August the quotations were, from eight different refineries, \$5.50 to \$6 per hundred, some refineries being \$5.50 and some \$6.

By Mr. Macdonald: Q. That is, in New York? A. That is f. o. b. New York or f. o. b. Philadelphia, three of the refineries being in Philadelphia.

20 By Mr. Boardman: Q. Now, on August 14th, Mr. Davis. A. (Referring to paper) On the 14th, the American Sugar Refining Company advanced to seven and a half cents, and all the refineries at full list price firm, meaning that seven and a half cents was the ruling quotation that day by all the refineries.

By the Court: Q. What does "seven and a half cents" mean? A. Per 100 pounds— I mean per pound; \$7.50 per hundredweight. Sugar is sold 30 on a decimal point basis.

Q. Now, have you got some later dates there after the 14th? A. Yes, sir.

By Mr. Boardman: Q. What day of the week was the 15th, do you know? A. The 15th was Saturday.

Q. You have testified that they are issued daily except Saturday? A. Except Saturday. Saturday 40 is a short day and they do not issue it.

Harry M. Davis—Direct

By the Court: Q. Have you got the 15th? A. No, sir; they issue no list on Saturday.

By Mr. Boardman: Q. What was the market price on Monday, the 17th? A. I haven't the list of the 17th, but the report of the 18th reads this way: "Refined sugars. All prices and market conditions remain unchanged, with the different refiners quoting seven and a half cents. The demands for shipment of purchases made some little time back is enormous. All refiners are badly over-sold, with no prospect of any improvement in this respect." 10

Q. Now, on the 19th and 20th, and so on? Just the price Mr. Davis. A. On the 19th, seven and a half cents, all refiners.

Q. And on the 20th? A. Seven and a half cents on the 20th. 20

Q. And on the 21st? A. Twenty-first, seven and a half cents.

The Court: The 22d would be Saturday.

Q. The 24th, Monday? A. The next list is the 24th. On the 24th, some refiners were seven and a quarter and some seven cents; Philadelphia was seven cents, and the American, Howell and Arbuckle and one in New York, seven and a quarter. 30

Q. On the 25th? A. Twenty-fifth, seven and a quarter.

Q. The 26th? A. I haven't the list of the 26th; I have only got the foreign list. I can't tell you that.

Q. Have you the 27th? A. No, sir; the next list which I have is the list of the 28th.

Q. The 28th, Friday. What was it then? A. The Federal Sugar Refining Company were tak- 40

Harry M. Davis—Direct

ing business at seven cents, or \$7 a hundred, and all the other refineries, \$7.25.

Q. The 29th was Saturday? A. I haven't the 29th list.

10 Q. The 31st? A. Those are all the lists of August that I have brought with me.

Q. And have you reports for any part of September? A. No reports for September; no, sir.

Q. From your knowledge of the trade, how was the market price in September—the beginning of September? A. A highly fluctuating market, the prices ranging from seven—in a wholesale carload way—from \$7.25 to \$6.75 during the month, a gradual dropping tendency.

20 Q. On September 9th, as nearly as you can state, what was the market price? A. Merely as a matter of recollection—I couldn't state that finally, but around seven and a quarter cents.

By Mr. Macdonald: Q. What is that? A. Merely as a matter of recollection, I would say seven and a quarter cents. I wouldn't make a final statement.

Q. You say around seven and a quarter? A. Yes, around seven and a quarter. It might have been \$7.35 and \$7.20.

30 By Mr. Boardman: Q. Mr. Davis, have you on behalf of Edward D. Depew & Company sent any letters to the defendant, Samuel Blafer? A. Oh, yes, we made demand on him for delivery of the goods.

Mr. Boardman: Have you the letter of August 12th?

40 Mr. MacDonald: No, sir; I have no such letter.

Harry M. Davis—Direct

Mr. Boardman: Then, under the notice to produce, I will offer the copy.

Q. I show you a paper dated August 12, 1915, marked at the top "Copy," and at the bottom, "E. D. Depew & Company." Look at that and tell us what it is (paper shown to witness). A. 10
That is a copy of a letter which I dictated to our stenographer, to Mr. Blafer, giving him instructions to deliver the hundred barrels of sugar that we had bought to the warehouse of the Lerbro Warehouse Company, at 466 Washington Street, New York City, for our account.

Mr. Macdonald: I beg your pardon. That is my mistake. We did get a letter on August 12th. My recollection was that it was August 15th. We got a letter on 20
August 12th, which is headed "Depew." The original letter had better go in, if you wish to offer it (handing paper to plaintiff's counsel).

Q. Is that the original of the copy which you have here (handing paper to witness)? A. Yes, sir; that is the original of the copy which I have here. This copy having been made separately, bears the date 1915, you see.

Q. This is the original letter? A. This is the original letter, 1914. This copy is an error in the date of a year. 30

Q. Will you read that?

Mr. Macdonald: I have no objection to its being offered. I will have some objection to the nature of the exhibit.

Letter identified by witness marked Exhibit P-3.

Q. Will you read it, Mr. Davis? A. (Reading.) 40

Harry M. Davis—Direct

10 “New York, August 12, 1914. Mr. S. Blafer, 128 Prince Street, Newark, New Jersey. Dear sir: Please instruct the refinery to deliver the 100 barrels of fine granulated purchased from you to the storage warehouse of the Lerbro Company, 466 Washington Street, New York City, for our account. Kindly have this delivery made as quickly as possible, and send us the invoice so that we can send check for the balance. Yours very truly, Edward D. Depew & Company.”

Mr. Boardman: Mr. Macdonald, will you please produce the telegram of August 17th.

(Defendant's counsel hands paper to plaintiff's counsel.)

20 Q. Mr. Davis, I show you a paper marked “Western Union Telegram, August 17, 1914.” I ask you what that is (paper shown to witness)?
A. That is a copy of a telegram which I sent to Mr. Blafer from our office, in New York, on the 17th of August, demanding delivery of the goods on that date.

Mr. Boardman: I wish to offer that. I will have that read, if you have no objection.

30 The Court: This is, as I understand, produced on notice?

Mr. Boardman: Yes.

Q. Read that, Mr. Davis. A. (Reading) “New York, August 17, 1914. S. Blafer, No. 128 Prince Street, Newark, New Jersey. Refinery has not yet delivered us the 100 barrels of granulated purchased from you last week. Telegraph us at once, at our expense, the name of the refinery
40 and the broker's name, and we will call on them

Harry M. Davis—Direct

and hurry the delivery. We must have the sugar this week. Edward D. Depew & Company, 515 Canal Street, New York City.

Mr. Boardman: I offer that.

Telegram marked Exhibit P-4.

(Plaintiff's counsel calls upon defendant's counsel for another letter.) 10

Mr. Macdonald: We have no other communications whatever purporting to relate to this transaction.

Q. Mr. Davis, did you have any communication on the subject of this sugar—did you receive any communication in answer either to your letter or to your telegram? A. By mail or telephone?

Q. In any way. A. I had a telephone message, not directly from Mr. Blafer, but from a gentleman who represented himself as— 20

Mr. Macdonald: One moment. Please do not state the contents of any alleged message which you had which was not directly from Mr. Blafer. I shall object to any such being admissible.

The Court: The message to which you refer did not purport to come from Mr. Blafer himself?

Witness: I wouldn't know Mr. Blafer on the telephone, your Honor. This gentleman called up and said, "I am talking for Mr. Blafer, who doesn't talk English—doesn't talk over the telephone." 30

The Court: Strike that out. It is not evidence.

Q. Has Mr. Blafer ever delivered this sugar?

A. No, sir.

Q. Or caused it to be delivered? A. Never delivered a barrel of it. 40

Harry M. Davis—Direct

Q. Mr. Davis, are you familiar with the customs of the trade in the sale and delivery of wholesale sugar? A. Perfectly.

10 Q. What is the custom as to delivery of sugar in the wholesale trade? A. The refiners in selling their sugar to us through the sugar brokers, and their contracts are usually made with the understanding that the sugar purchaser has the option of taking the goods out from the refinery at any time in thirty days. When, however, they desire to make a shorter term of delivery and reduce their warehouse stock, or refinery stock, they often sell sugar on a seven day contract, giving the buyer only seven days to take it out from the refinery, sometimes fourteen days, if
20 the circumstances with them are such.

Q. When there is no agreement expressed as to time of delivery, what is the general custom? A. It is an understood thing that thirty days is the limit. They are not cast-iron in their enforcement of that, and sometimes will permit buyers to go further than thirty days in taking their purchases.

30 Q. What is the meaning of the expression "Factory shipment"? A. For shipment delivery direct from the refiner to a purchaser, not to the buyer's store, a delivery made on instruction of a contractor for sugar to a third party.

Q. And what is the meaning in the trade of "Two per cent, ten days"? A. Sugar is sold by all refineries on a basis of thirty days' credit, approved credit, less a cash discount of two per cent, if the bill is paid in ten days.

40 Q. Ten days from what date? A. From the date of the bill, the bill being dated the day of the delivery, as a rule.

Harry M. Davis—Direct

By the Court: Q. Let me see if I understand that. Your basis is thirty days' credit? A. Thirty days on approved credit, or discount terms of two per cent off for payment in ten days. The thirty day rule is almost never enforced.

By Mr. Boardman: Q. In a sale of sugar where the terms two per cent, ten days, are made, and where no time is expressed as to the time of delivery, and where a letter calling for delivery is sent in two days from the date of the contract, and a telegram seven days after the date of the contract, urgently calling for delivery, what would be the custom of the trade under such circumstances? 10

Mr. Macdonald: I object, if the Court please. The question itself is stultifying. My friend is asking what is the general custom under some special, unusual circumstances. The question itself is self-contradictory and absurd. 20

The Court: I sustain your objection. I suppose what you want to get at is when this bill of goods, according to the general custom, was deliverable, or payable, whichever you want to know about. Is that your idea? 30

Mr. Boardman: Yes, I asked the witness, when was this bill of sugar deliverable?

Mr. Macdonald: I object to that, if the Court please, because the contract speaks for itself. The contract says "Factory shipment," and the witness has already described that and defined that as being thirty days delivery. 40

Harry M. Davis—Direct

The Court: Perhaps the witness has answered the question.

Mr. Macdonald: Yes, sir; he has, and the contract speaks for itself.

10 Mr. Boardman: If I remember the testimony, it was within thirty days.

Mr. Macdonald: No, he said where there was no express contract as to delivery, thirty days was the time for delivery.

By the Court: Q. Looking at Exhibit P-1, Mr. Davis, under the custom of the trade, as you understand it, what are the dates of delivery and of payment on that contract (paper shown to witness)? A. The delivery on this contract should have been immediate. It was not a factory sale,
 20 but a sale by a second hand owner of sugar—not a producer, but a jobber—and he should have made delivery immediately of this sugar—“immediately” meaning five or six days, a reasonable time—and I demanded of him by telephone the delivery at a time that was usual, having given him a week’s notice to deliver his sugar, and it was up to him to have the refinery make that delivery on his contract with them, had he a contract to cover his sale.

30 Q. The payment would be within thirty days—
 A. The payment would have been within ten days.

Q. —unless the seller—no, I will withdraw that. You have spoken as to the time of delivery. Under that contract what was the time of payment?
 A. The payment would have been ten days from the date of the delivery, not being a refinery contract, with any privilege of thirty days.

40 Mr. Macdonald: Now, if the Court

Harry M. Davis—Cross

please, I move that that answer be stricken out from the record as an attempt to contradict this written contract. The contract says that the delivery shall be factory shipment, and the witness has already defined factory shipment. That is delivery in thirty days. So that this answer is an attempt to vary and contradict the terms of the written contract. It is therefore unlawful, inadmissible and improper, and I move that it be stricken out. 10

The Court: I understand the testimony of the witness to be his view of the application of a trade custom. Looking at the testimony in that way, I will let it stand and overrule your objection. 20

Defendant's counsel pray an exception to this ruling of the Court.

Exception noted as ground of appeal.

By Mr. Boardman: Q. Mr. Davis, is there any further fact connected with this sale, within your personal knowledge, which you have not stated? (No response.)

Q. If not, just say no. A. No, there is nothing further bearing on it except what the witnesses have shown as to the sale of sugar later by the defendant. 30

CROSS-EXAMINATION by Mr. Macdonald:

Q Mr. Davis, Edward D. Depew & Company are a large wholesale grocery house in New York City? A. No, sir.

Q. Well, do you mean that they are not wholesale grocers or that they are not in New York 40

Harry M. Davis—Cross

City, or what do you mean? A. I mean that they are not large.

Q. Well, they are wholesale grocers, then, in New York City, are they not? A. Yes, sir.

10 Q. And do they occupy this large six-story building which appears on their letterhead? A. Yes, sir.

Q. They occupy the whole of it? A. They do.

Q. And they carry on their wholesale grocery business in the whole of that building? A. They do.

Q. Then when you say that they are not large, you mean that they are not quite as large as some other firms, perhaps? A. No.

Q. Is not that what you mean? A. No.

20 Q. Well, what do you mean? A. A large wholesale grocery would not be considered a man that did less than a business of ten million a year, and we do a business of one million.

Q. You do a business of one million a year? A. Yes.

Q. And, in your opinion, that is not a large business? A. Not large, no.

30 Q. But it become a necessity, in the variety of lines of this business, to occupy this six-story building here, which is pictured upon your letterhead? A. Surely.

Q. And in the wholesale grocery business you have and deal in a great many lines of goods, do you not? A. Yes, sir.

Q. Roughly speaking, about how many lines of goods are there? A. That would be hard for me to tell you, sir.

40 Q. Well, roughly? A. Thousands of items purchased—

Harry M. Davis—Cross

Q. Well, I mean lines of goods. For instance, you deal in sugar, you deal in flour, you deal in butter, you deal in eggs, and you deal in cereals, and brooms and— A. Well, we have a 200 page catalogue, counsellor; I could take that and tell you the items, but I couldn't remember that.

Q. You have a 200 page catalogue of items in which you deal? A. Yes, sir. 10

Q. And you deal in sugar? A. We do.

Q. In flour? A. No.

Q. Do you not deal in flour? A. No.

Q. You deal in coffee? A. Yes.

Q. In tea? A. Yes, sir.

Q. In breakfast cereals? A. Yes, sir.

Q. Starch? A. Yes, sir.

Q. And in supplies? A. Yes, sir. 20

Q. And in what other things, roughly speaking, besides those do you deal in? A. Well, largely California products such as nuts and raisins, citron from abroad, prunes, canned goods of all descriptions.

Q. How many buyers all together does your firm employ? A. Four.

Q. Your firm employes four buyers? A. Yes, sir.

Q. I understood you to say that you are manager of all of the salesmen of the firm? A. Yes. 30

Q. How many salesmen does the firm employ? A. At the present time thirty-two.

Q. And you are in charge of those thirty-two salesmen? A. Yes, sir.

Q. And you say that you are also a buyer? A. Yes.

Q. Well, when you say that you are a buyer, 40

Harry M. Davis—Cross

does that mean that you are every day a buyer or only occasionally a buyer? A. Well, my position is that of a buyer, Mr. Macdonald.

10 Q. Yes, so you have said, but I am trying to find out what you mean by that. Do you mean by that that every day you buy goods or only occasionally you buy goods? A. Every day or every minute; I would buy goods right at this minute if they were offered to me and I wanted to buy them.

Q. Right in this court room? A. At any place and at any time.

Q. You mean that you have authority to buy goods when you think you can pick up goods favorably for the house? A. Surely, in their interest.

20 Q. Now, when did this young man, Silberman, come into the employ of your house? A. I can't give you a definite date, but I should say in the spring of 1914.

Q. A few months prior to this 10th day of August? A. Yes.

Q. And his duties were to go out and collect accounts? A. Why, primarily to sell goods.

30 Q. To the small retail grocers? A. Anybody that could pass credit satisfactory to us could buy from him, either small retail or wholesale.

Q. Then his business was to collect these accounts in the territory where he sold? A. Not always. Many of the customers remit direct to the house.

Q. Well, when they had to be collected it was his business to collect, was it not? A. He had authority to collect, yes.

40 Q. Now, you say that on the 8th day of August, 1914, you had a conference with Mr. Silberman

Harry M. Davis—Cross

and you informed him that the sugar market was uncertain, fluctuating, and so forth; that is correct, is it? A. Yes.

Q. And you told him to pick up sugar, if he could, from some of the customers of the house?

A. I told him to buy sugar wherever he could buy it. 10

Q. Pick it up wherever he could? A. Not picking it up; buy it.

Q. Well, it means the same thing, does it not?

A. No, it does not to me.

Q. Well, we will take your term, then; buy it, if he could. And you said to him that on Monday you would give him instructions as to what to buy and the price? A. Certainly.

Q. And you say that on Monday morning you sent him instructions? A. Yes. 20

Q. And they were to buy sugar wherever he could get it for under \$5.30—a limit of \$5.30 or less? A. Yes.

Q. You knew that his business ordinarily put him in communication with retail grocers, did you not, that he called on them ordinarily? A. Yes.

Q. To sell goods and collect accounts? A. As well as small jobbers.

Q. Yes, small retailers and small jobbers? A. Yes. 30

Q. And your idea was that if he could get a contract out of any of those men for \$5.30 or less, that that would be a good deal for the house? A. It would be a good purchase; yes, sir.

Q. Now, what was Mr. Silberman to get out of that? A. Mr. Silberman was to get nothing whatever. 40

Harry M. Davis—Cross

Q. And what were you to get out of it? A. I would get my regular salary, sir. I am employed on a salary, and I had no special interest in it.

10 Q. Is it not a fact, Mr. Davis, that you said to Mr. Silberman, "Now, Silberman, if you can pick up sugar, or buy sugar, anywhere less than \$5.30 around among these men that do not know what the market price is, that you and I can divide the difference, whatever it is, less than \$5.30?" A. No, sir; it is not a fact and no such conversation ever took place.

Q. Without being in so many words, was not that the understanding between you and Silberman? A. Absolutely not.

20 Q. Nothing of that kind whatever? A. Absolutely nothing of that kind.

Q. Well, you say, then, that Mr. Silberman bought a hundred barrels of sugar from this man in Prince Street, Newark? A. He did.

Q. On August 10th? A. For my account, or for my concern's account.

Q. Well, then, did you send Mr. Silberman to Mr. Blafer to demand that sugar? A. I did not.

Q. Or tell Mr. Blafer when it should be delivered? A. I did that myself right in New York.

30 Q. Please answer my question. My question is, "Did you send Mr. Silberman?" A. I did not; I said no.

Q. Did you ever give Mr. Silberman any directions whatever to go to Mr. Blafer and interview him in relation to this supposed contract? A. No.

Q. Did Mr. Silberman report to you on the Tuesday following in New York? Was he there in relation to his duties? A. No.

40 Q. No? A. No.

Harry M. Davis—Cross

Q. Did he report by letter or by 'phone or in any way to you? A. He reported by 'phone.

Q. By 'phone to you? A. Not to me, not to me.

Q. Did he report anything about this transaction of August 10th? A. Yes.

Q. Did he report that Mrs. Blafer had come to him and told him that the deal was off and had returned the check of Mr. Krasner? A. He did not; he reported that he had made the transaction and that Mr. Blafer had acknowledged it. 10

Q. And he did not say anything at all about Mrs. Blafer having come and called the deal off? A. No, sir; he did not.

Q. Did he ever tell you or any one in the firm, to your knowledge, that Mrs. Blafer had come to him and called this deal off? A. If you would call the return of the deposit check calling the deal off, he told me that. 20

Q. Well, when did he tell you that? A. I wouldn't specify dates, sir, because I don't remember, to be exact.

Q. Your memory is not quite so clear on that as it was before, is it? A. Not on that particular date.

Q. You can remember positively and clearly everything that occurred on the 10th and 8th of August with relation to this transaction? A. Very clearly. 30

Q. But you do not remember so clearly, or you do not remember clearly at all, about Mr. Silberman telling you that Mrs. Blafer had brought back the check? A. I remember him telling me that.

Q. When did he tell you that? A. I can't tell 40

Harry M. Davis—Cross

you the date. That has no bearing on it, so far as I can see. I didn't keep the date in my mind.

Q. I am not asking you what bearing it has. A. Well, but I don't remember the date.

Q. The Court will attend to that. I am asking
10 you if you will be so kind as to, directly and without fencing and without evasion, answer my questions.

(Question read.)

A. I couldn't specify exactly the date.

Q. How soon after the 10th day of August was it that he told you? A. Perhaps four, perhaps five days; I don't remember.

Q. You cannot remember? A. The exact date I cannot remember.

20 Q. Was it not because Mr. Silberman told you that you dictated this letter of August 12th? A. No, that had no bearing on it whatever.

Q. Now, I show you this letter of August 12th, which is marked Exhibit P-3 (paper shown to witness). Look at that again, if you please. A. Yes, sir.

Q. That has a typewritten signature, "Edward D. Depew & Company," has it not? A. Yes.

Q. And it was not signed by any member of the
30 firm? A. No.

Q. Signed by the typewriter who wrote it? A. Who took my dictation.

Q. There are not even any initials of any member of the firm or anyone else following that typewritten line there of the name "Edward D. Depew & Company," are there? A. There are no initials of the firm following that line; No, sir.

40 Q. Or any other initials? A. Not following it,

Harry M. Davis—Cross

but over here are the initials, "H. M. Davis," the dictator, and of the stenographer.

Q. I beg your pardon! It does not say, "H. M. Davis." A. That is the significance of it.

Q. It simply says at the left the initials "H. M. D.," and "V. C.," or some other. A. "T. C." 10
That is the stenographer.

Q. That is all it says? A. It represents the dictator and stenographer, as is customary, I think, in business houses.

Q. Is it customary in business houses— A. It is.

Q. One moment. You have volunteered this. Now do not be afraid of your own volunteered statement. A. I am not, sir.

Q. Do you mean to say that it is customary in business houses to send out such a letter as that? 20

A. Yes, sir; every day, and marked with the dictator's name and stenographer's initials just in that manner.

Q. Just exactly in this manner, Mr. Davis? A. Surely.

Q. Do you not know that you are stating an untruth? A. I am not stating an untruth.

Q. That that is not the custom; that it is the custom of the one who dictates, or the member of the firm, to either sign the letter or initial it, so 30
that the firm may be bound; do you not know that, as a business man? A. I know that we never do that; that many firms never do it, and that the firm's letters go out that way and have gone out that way through all my business experience and I get hundreds of them from other people just that same way, sir.

Q. Now Mr. Davis, could your firm have been held on a typewritten— 40

Harry M. Davis—Cross

The Court: You need not answer that question.

Q. —on a typewritten statement like that? A. I would be glad to answer it. We would be glad to be held, sir.

10 The Court: It appears to be a question of law.

Mr. Macdonald: Yes, sir; undoubtedly.

Q. You never made any personal demand upon Mr. Blafer for this sugar? A. I did; I sent him a telegram asking for it.

Q. Mr. Davis, do you understand English? A. I do.

Q. Did you hear my question? A. I did.

Mr. Boardman: I object.

20 Q. I asked you, Did you make any personal demand on Mr. Blafer for this sugar? A. I sent him a telegram myself and requested delivery.

Q. Is that the only demand that you made, this telegram and this letter? A. Yes.

Q. When you told Mr. Silberman to buy sugar, if he could, on Monday, August 10, 1914, did you give him any money to buy with? A. I did not.

30 Q. Did you ever pay out any money to Mr. Blafer in this transaction at all? A. Never paid a dollar to Mr. Blafer directly.

Q. Now, in the state of demand in this case, or the complaint, it says that on August 13, 1914, the defendant refused to deliver this sugar. Is that a fact, that on August 13th Blafer refused to deliver this sugar? A. That refreshes my memory; I think perhaps that was the date that the telephone was sent to me in Blafer's name; that
40 might have been the date.

Harry M. Davis—Cross

Q. It might have been? A. Yes, I couldn't testify to that as the exact date.

Q. Your memory seems to be very vague on some points, Mr. Davis. A. And well reenforced on others, because I have reason to remember.

Q. Now, I ask you again, Is it a fact, as claimed in the complaint in this case, that on August 13, 1914, the defendant refused to deliver this sugar? 10

Mr. Boardman: I object, if your Honor please.

The Court: On what ground?

Mr. Boardman: On the ground that the actual date of the 13th is immaterial. Moreover, that the expression is not confined to "refused," but also to "neglected to deliver." 20

The Court: I have not the letter before me. I assume that counsel's question quotes correctly.

Mr. Macdonald: It says, "neglected and refused to deliver the sugar on August 13, 1914."

Mr. Boardman: It is the sixth paragraph in the complaint.

The Court: I thought this referred to a letter. 30

Mr. Macdonald: No, it is the demand made as the basis for this suit.

The Court: You are quoting from the complaint, and inquire of the witness whether it is true that on August 13, 1914, the defendant refused to deliver the sugar as stated in the complaint?

Mr. Macdonald: Yes. 40

Harry M. Davis—Cross

The Court: I understand your question now. I thought you were referring to something else. You may answer the question.

A. I made no demand on him, that I remember, on the 13th of August for delivery.

10 Q. Mr. Davis, you are not answering the question. Will you be kind enough to answer the question? A. Yes, I will be glad to do so.

Q. (Question read as follows: "Now, I ask you again, Is it a fact, as claimed in the complaint in this case, that on August 13, 1914, the defendant refused to deliver this sugar?") A. It is a fact.

Q. Now, then, did you buy elsewhere on August 13th a hundred barrels of sugar to meet this contract?

20 Mr. Boardman: I object, if your Honor please.

The Court: I will allow it.

Plaintiff's counsel prays for an exception to this ruling of the Court.

Exception noted as ground of appeal.

A. We did not buy a specific hundred barrels, but I was buying sugar every day.

Q. Well, how much did you buy on August 13, 1914? A. Without the records I couldn't tell you.

30 Q. Your memory is not quite so good as to that, then? A. I wouldn't tell you I bought a thousand barrels; I might have bought eleven hundred, and without the records I couldn't answer it.

Q. And you might have bought a hundred barrels on August 13th, might you not? A. Oh, no, our purchases were very much heavier at that time.

40 Q. They were heavier? A. Than a hundred barrels, yes.

Harry M. Davis—Cross

Q. Now, if I am incorrect, set me right. Then on August 13, 1914, you d.d buy more than 100 barrels of sugar; is that right? A. Oh, yes.

Q. Now, perhaps it may refresh your memory, Mr. Davis. You have said that Mr. Silberman told you that Mrs. Blafer came to him and returned Krasner's check. Did he not tell you that on August 13th? A. I couldn't tell you the date, sir. 10

Q. Was it not because Mr. Silberman told you that that you fixed August 13th as the day when the defendant refused to deliver? A. No, it was not.

Q. No? A. No.

Q. Then why did you fix August 13th as the day when the defendant refused to deliver? A. I didn't fix August 13th entirely and specifically as that date for him to deliver, but I did give him a reasonable time, and on the 17th made my final demand. 20

Q. Mr. Davis, I did not ask you anything about that; I asked you about the date that the defendant refused to deliver. A. Yes. Well, he refused continuously to deliver at every day; he never has delivered.

Q. Undoubtedly, that is your statement, but I am asking you when it first came to your knowledge that he was not going to deliver? Was not that on August 13th, or was it? A. No, it was away after that. 30

Q. When he first refused to deliver? A. It was after that, except perhaps with the exception of the telephone call, which I testified to before, and I won't be certain about the date of that.

Q. And, if you can help it, you are not going 40

Harry M. Davis—Cross

to be certain about any date that they refused to deliver? A. I would be very glad to have that admitted in evidence, if you can get it in, Mr. Macdonald.

10 Q. I would be very glad to have it in, if you will answer my question. You have already stated that August 13th was the date when the defendant refused to deliver. A. One of the dates; yes, sir.

Q. Is that true? A. Yes, sir.

Q. Then what did you mean by saying now that it was a long time after August 13th? A. That he refused to deliver?

20 Q. Yes. A. He still refuses to deliver. I gave him an opportunity to deliver a long time after that.

30 Q. Mr. Davis, I trust my questions are in English and understandable. They were directed to the first time when this came to your knowledge, that the defendant would refuse to deliver. You have made two different, irreconcilable statements. One was that that first came to your knowledge on August 13, 1914, and the other was that it was a long time after that date. I am asking you which of those is correct? A. They are both correct.

Q. You say in one breath, Mr. Davis, that this first came to your knowledge on August 13, 1914, do you not? A. Yes.

Q. Now, are you aware of the meaning of the word "first"? A. Yes.

Q. It means the first time, does it not? A. Yes.

40 Q. Now, with the same breath almost you say that it first came to your knowledge a long time after August 13th. Now, how can those two state-

Harry M. Davis—Cross

ments both be correct. A. Because the knowledge came to me through two different sources, and one I do not know as authentic.

Q. Do you mean to say that the second source was also the first source? A. No, sir.

Q. What do you mean to say? A. The second source was the fact that I did not get the goods in response to my demand on the 17th. 10

Q. Now, there was a first and second source, then? A. Yes, sir.

Q. We will finally get what you mean, I hope. The first information that you got was on August 13, 1914; is that correct? A. Yes.

Q. Then the second source was not the first source, was it? A. No.

Q. But a few moments ago you said it was? A. 20
No. I did not say so.

Q. Well, the jury and stenographer will remember exactly what you said. Why did you not buy this hundred barrels of sugar on the 13th of August, when you knew or claim to have known that Mr. Blafer was not going to keep his contract? A. I had no authority to buy any sugar nor to regard the telephone conversation as authentic.

Q. Do you want that answer to stand? A. I 30
would be pleased to have it stand, sir.

Q. Then on August 13, 1914, you had no authority to buy sugar? A. What do you mean by that, for who?

Q. You have just stated it, have you not? A.
Yes.

Q. And that is a fact, then, is it not? A. That is a fact, that I had no authority to buy sugar for Blafer. You put it up to me in that light. 40

Harry M. Davis—Cross

Q. I beg your pardon! I have been asking you, Mr. Davis, and trying all possible means known to me in the English language to get some intelligible answer from you. You have claimed to be a buyer for E. D. Depew & Company, in New
10 York City. A. That is right, sir.

Q. And my question was, on August 13, 1914, when you knew that Mr. Blafer, or claimed to have known that Mr. Blafer would not keep his contract with you, why you did not buy a hundred barrels of sugar then for your firm, and your answer was that you had no authority to buy any sugar on that date? A. For Mr. Blafer's contract.

Q. I did not ask you about buying for Mr. Blafer. A. Let me amend my answer, then, to that
20 effect.

Q. You were not in the employ of Mr. Blafer? A. No.

Q. And I repeated the question, and asked you if you wished to stand on that, that on August 13th you had no authority to buy sugar, and you said you wanted it to stand. Do you now mean to say that that answer was conditioned by an unexpressed idea in your own mind, not told to the Court and jury, that you meant to condition that
30 reply by saying in your own mind, "Well, that means that I did not have to buy for Blafer?" Is that what you mean now? A. What I mean is now that I had authority to buy any sugar that day or any other day, and still have it, but the telephone message that was sent me advising me that—

Q. Mr. Davis, I did not ask you anything about the telephone message. I am trying to get a di-
40 rect answer from you without evasions.

Harry M. Davis—Cross

The Court: I think the witness ought to be allowed to complete his statement, which is an answer to an explanation that you called for.

(Answer read.)

The Court: Go on and finish your sentence. 10

Mr. Macdonald: If the Court please, I submit that the contents of a telephone message from someone unidentified and unconnected with this defendant is entirely inadmissible, either by way of explanation or any other way. It has already been ruled out by the Court. That is the reason I stopped the witness.

The Court: The matter is presented now 20 in such a way that I think the witness is entitled to make his explanation.

Defendant's counsel pray an exception to this ruling of the Court.

Exception noted as ground of appeal.

(Answer read as follows: "What I mean is now that I had authority to buy sugar that day or any other day, and still have it, but the telephone message that was sent me advising me that—") 30

Witness: —Mr. Blafer wouldn't live up to his contract to deliver E. D. Depew & Company the one hundred barrels of sugar purchased, gave me no authority to buy any sugar for his account, as the telephone message came from a party purporting to represent Mr. Blafer and who was an entire stranger to me.

Mr. Macdonald: Now, if the Court please, I move that that be stricken out as 40

Harry M. Davis—Cross

being irresponsible to my question and being inadmissible, as an attempt by this witness to state a conversation with some third party unconnected with the defendant.

10 The Court: The motion is denied.

Defendant's counsel pray an exception to this ruling of the Court.

Exception noted as ground of appeal.

Q. You have already stated, Mr. Davis, that it might have been upon the 13th day of August that you received word through Mr. Silberman that Blafer had called the deal off; isn't that right?

A. No, sir, I don't remember making such a statement as that, Mr. Macdonald.

20 Q. Now, is it not right that on or about the 13th day of August you did get information through Silberman that the deal was off? A. No.

Q. Is it not right that Silberman reported to you that Mrs. Blafer had come and returned the deposit, or the check, and said that they would not deliver it? A. Not on the 13th, sir.

Q. Now, on what day was it? A. I would fix that as being Saturday of that week—that would be the 15th—that he reported his troubles to me.

30 It might have been the following week. I wouldn't state that specifically, to pin myself down to a date.

Q. You are not going to pin yourself down to any date as to that, are you? A. Not on a thing that is as indefinite as that.

Q. But you are going to pin yourself down to a date as to this telephone conversation, if you can,
40 are you not? A. Yes.

Harry M. Davis—Cross

Q. If you think it is in your favor, you are going to pin yourself down to a date; is that correct?

Objected to.

A. I am going to pin myself down to the facts and the truth, Mr. Macdonald.

Q. I hope so. A. If you are going to permit it.

10

Q. Now, Mr. Davis, you have stated here, and repeated it, that the first time when you got information that this deal was off was on August 13, 1914? A. Yes.

Q. That is true, is it not? A. Yes.

Q. Now, then, I repeat my question. Having had information on August 13, 1914, that this deal with Sam Blafer was off, and that Blafer would not deliver, why did you not buy this one hundred barrels of sugar for Messrs. E. D. Depew & Company, your employers, in order to meet that amount that was necessary? A. Because that information came to me from a source that was not authentic or which I could recognize as being Blafer himself.

20

Q. Did you ever get any information from Mr. Blafer himself? A. Never got any information as to sugar or anything else.

Q. And you did act upon the information which did not come from Mr. Blafer himself, did you not? A. No.

30

Q. And purchased a hundred barrels of sugar? A. No.

Q. Isn't that so? Didn't you ever purchase a hundred barrels of sugar to meet this contract? A. I never did.

Q. You never did? A. No, sir, not that particular hundred barrels as an individual purchase.

40

Harry M. Davis—Re-direct

Mr. Macdonald: Well, that puts a new aspect on the case. That is all.

RE-DIRECT-EXAMINATION by Mr. Boardman:

10 Q. On cross-examination you were asked whether you had paid any money to Mr. Blafer, and you said you had not directly—

Mr. Macdonald: He did not say he had not directly; he said he had not at all.

Mr. Boardman: I beg your pardon! I think the stenographer's notes will show the word "directly."

Q. Have you paid out money in connection with this deal? A. Yes, sir.

20 Q. How much?

Mr. Macdonald: I object. It is entirely immaterial; it is a vague question. The question is, "Have you paid out money in connection with this matter?" That does not bind the defendant.

The Court: I will take the witness's answer, and I will overrule your objection, if you make a formal objection.

30 Mr. Macdonald: I formally object to the question as being irrelevant and incompetent.

The Court: I understood that that was probably your objection.

(Question read.)

A. \$150.

Q. In what way? A. In the form of a check drawn to the order of Mr. J. Krasner.

The Court: I did not get that name.

40 Witness: J. Krasner, the former witness.

Harry M. Davis—Re-cross

Q. When? A. That date I couldn't tell you.

Q. What was the occasion? A. It was a deposit.

Objected to.

Q. What caused you to draw it?

The Court: You may answer that question. 10

A. We sent the check to Mr. Krasner to reimburse him for a check of \$150 that he had given Mr. Silberman as deposit on a sugar purchase made from Mr. Blafer.

RE-CROSS-EXAMINATION by Mr. Macdonald:

Q. Mr. Davis, you have personal knowledge of this check for \$150? A. I seen the check stub in the book. 20

The Court: Which check do you refer to?

Mr. Macdonald: The check which he claims his house made.

The Court: I meant to ask the witness, Which check do you refer to in your answer to Mr. Macdonald's question.

Witness: I refer to our check, your Honor.

(Former question and answer read as follows: "Q. Mr. Davis, you have personal knowledge of this check for \$150? A. I seen the check stub in the book.") 30

By the Court: Q. Now, that is you own check?

A. E. D. Depew & Company's.

Q. The one that was sent by your concern? A. The one that was sent to Krasner.

Q. The one that was sent to Krasner? A. Yes, sir. 40

Harry M. Davis—Re-re-direct

By Mr. Macdonald: Q. When did you see that stub, Mr. Davis—when last? A. I should say it was along in December or November, last fall, some time ago; I couldn't tell you the date; when they were getting the records together.

10 Q. Did you ever see the returned check that passed through the bank? A. No, sir; I have nothing to do with that department; the cashier handles that.

Q. And you are merely testifying now to the fact that you saw a stub in the check book of E. D. Depew & Company for \$150, and the payee was J. Krasner; is that right? A. Yes, that is all I know of it.

20 Q. And that is all you know of it? A. That is all I know of that particular check; yes, sir.

Mr. Macdonald: If the Court please, I move that that be stricken out as hearsay, incompetent and irrelevant to this issue.

The Court: I will let it stand.

Defendant's counsel pray an exception to this ruling of the Court.

Exception noted as ground of appeal.

30 Further DIRECT-EXAMINATION by Mr. Boardman:

Q. Mr. Davis, you have testified to the market value of sugar on various dates, and we have this contract in evidence. What is the quantity contained in one hundred barrels of sugar? A. 35,000 pound average.

Mr. MacDonald: One moment. This is not proper re-direct.

40 The Court: No, not strictly, but if it is

Harry M. Davis—Re-re-direct

an omitted question, I will allow it to be asked.

Mr. Boardman: Well, it was simply with the intention of bringing out more specifically the computation of the damages which we claim. 10

The Court: If the objection is insisted on, I will sustain it.

Mr. Macdonald: I insist upon the objection.

Mr. Boardman: I take it that this is probably a matter of arithmetic, anyway, as to the amount.

The Court: The witness has used certain market reports, which were not offered in evidence, and perhaps intentionally were not offered in evidence. What do you want done with those, if anything, or what do you say about them? 20

Mr. Boardman: I think I shall offer them in evidence, all that were testified to.

The Court: They do not stand on the ground of memoranda made by the witness; they are something like a daily newspaper. I suppose they strictly ought to be offered, if you want to get them into the case. 30

Mr. Macdonald: I have no objection to their going in.

Papers referred to as market reports marked Exhibit P-5.

Isidor Silberman—Direct

ISIDOR SILBERMAN, re-called in behalf of plaintiff:

Direct-examination by Mr. Boardman:

10 Q. Mr. Silberman, there has been evidence as to a check, or a check stub, having been seen by Mr. Davis of a check—

Mr. Macdonald: No, he did not say he had seen the check; he said he saw the check stub.

Mr. Boardman: That is what I said.

20 Q. —a check stub having been seen by Mr. Davis, purporting to indicate a check for \$150 by Edward D. Depew & Company to J. Krasner. Have you seen such a check? A. Well, I will have to explain that; I couldn't answer it with either yes or no.

Q. Well, explain.

Mr. Macdonald: One moment. I object to any explanation being entered upon until the witness first answers the question whether he has seen the check or has not. The question calls for a direct, categorical reply. An explanation may lead into hearsay.

30 The Court: I understand the witness to say that he cannot answer the question either yes or no.

Mr. MacDonald: Well, then, he cannot answer the question at all.

Mr. Boardman: Well, I will modify the question.

Q. Have you seen a check— A. I have.

40 Q. —drawn by Edward D. Depew & Company— A. Yes.

Isidor Silberman—Cross

Q. —to J. Krasner? A. No, it was drawn to myself, and I indorsed it and gave it to Mr. Krasner.

By the Court: Q. Can you tell us when that was? A. It was on August 11th, the following day; it was mailed to me on Monday night. 10

By Mr. Boardman: Q. What day was Monday, what date? A. The 10th. I received it Tuesday morning, the 11th.

Q. And what did you do with it? A. Indorsed it and gave it to Mr. Krasner, and he deposited it.

Q. Why?

Mr. Macdonald: I object. Why he gave it to Mr. Krasner is inadmissible.

The Court: I will sustain your objection. 20
The reason is pretty obvious, I think.

CROSS-EXAMINATION by Mr. Macdonald:

Q. Mr. Silberman, you recall this check very perfectly and clearly, do you? A. Very.

Q. And you recall perfectly and clearly that it was August 11, 1914? A. Yes.

Q. Did you go into the house of E. D. Depew & Company, in New York, to get the check on August 11th? A. No, sir; I did not.

Q. Did it come to you by mail out here? A. 30
Yes.

Q. What was the date on the check? A. I didn't notice; it was immaterial to me.

Q. You noticed very particularly and you remember very particularly that the check was drawn to your order? A. Well, I had to indorse it, so—

Q. I did not ask you about the indorsement, 40

Isidor Silberman—Cross

Mr. Silberman. I asked you if it is a fact that you remember clearly that the check was drawn to your order? A. Yes.

Q. Do you? A. I do.

Q. And you received that check by mail from E. D. Depew & Company on August 11, 1914? A. Yes.

Q. What time of day? A. I don't know.

Q. Was it in the morning? A. I presume so.

Q. Did it come by mail to your house? A. It did.

Q. Was it delivered to you in the morning before you went out upon your business? A. I am not positive, either the first or second mail.

Q. After you went out upon your business that day did you go back to your house to see if there was any mail? A. No, I went back for luncheon. If there had been any mail I would have gotten it.

Q. If there had been you would have gotten it? A. I am not saying there was not.

Q. The only thing that you are clear about, then, is that the check was made to your order and that you indorsed it over to Mr. Krasner? A. Yes.

Q. And you do not remember the date that happened? A. I didn't notice it; I didn't say I don't remember it.

Q. Have you ever seen that check since? A. I have not.

Plaintiff rests.

At 1 o'clock, p. m., the Court takes a recess of one hour.

Motion for Nonsuit

After recess.

Mr. Macdonald: If the Court please, I move the Court that the plaintiff be nonsuited upon the following grounds:

First, that it appears from the evidence that there was no consideration for the alleged contract sued upon. 10

Second, that if it be found from the evidence that any contract was entered into between the plaintiff and the defendant on August 10, 1914, such contract was rescinded on the morning of August 11, 1914.

Third, that there is no evidence of any neglect or refusal on the part of the defendant to deliver one hundred barrels of sugar or to comply with the contract sued upon. 20

Fourth, that there is no evidence in the case whatever of any payment or a tender of payment of the purchase price, assuming that a valid contract of sale and purchase was entered into.

Fifth, that there is no legal evidence of any damages in this case, or no legal evidence from which the jury will be able to compute damages. 30

Sixth, that there is no proof, excepting such as might be gathered from the contract itself, of any place of delivery, and there is no proof of any demand made by the defendant at any place of delivery.

Seventh, that there is no evidence in the case of market price at the place of delivery. 40

Samuel Blafer—Direct

10 Eighth, that the evidence in the case, assuming that there is evidence in the case, for the sake of argument, of any contract between the plaintiff and the defendant, is at variance with the contract set up in the complaint. The contract set up in the complaint, in the second paragraph of the complaint, is that on August 10, 1914, at Newark, N. J., the defendant sold plaintiff one hundred barrels of fine granulated sugar, 350 pounds per barrel, at \$5.10 per hundredweight, with discount of two per cent if paid within ten days after delivery. There is no evidence in the case whatever that any fine granulated sugar was either

20 bought or sold, and there is no evidence in this case whatever of any market price either in New York or Newark, or elsewhere, of fine granulated sugar.

On these grounds, I submit, if the Court please, that the plaintiff should be nonsuited.

The Court: The motion to nonsuit is denied.

30 Defendant's counsel pray an exception to this ruling of the Court.

Exception noted as ground of appeal.

SAMUEL BLAFER, defendant, sworn in his own behalf:

Direct-examination by Mr. Siff:

40 Q. Mr. Blafer, you are the defendant in this case? A. Yes.

Samuel Blafer—Direct

Q. Where do you live, Mr. Blafer? A. One hundred and twenty-five Prince Street.

Q. Did you live there in August, 1914? A. Yes, sir.

Q. Where is your place of business now? A. One hundred and twenty-six Prince Street.

Q. Where was your place of business in August, 1914? A. One twenty-eight Prince Street. 10

Q. You have moved from One hundred and twenty-eight to One hundred and twenty-six Prince Street since? A. Yes, sir.

Q. Do you recall in August, 1914, when Mr. Silberman called at your place of business? A. Yes, sir.

Q. What time did he call at your place of business? A. Early in the morning.

Q. About what time did he call? A. Half-past seven or eight o'clock. 20

Q. What did he say to you at that time? A. If I need anything for my business, to buy something.

Q. What did you say to him? A. I told him—he told—when he came in he told me if I need something, to buy something; he showed me some samples, some rice and some farina and some other stuff. I don't remember if I gave him an order or not. 30

The examination proceeds through the Yiddish interpreter.

Q. What did Mr. Silberman say to you when he came to see you that morning? A. He asked me if I need goods, several articles for my store.

Q. Now, just tell us all the conversation that took place between you at that time, so far as you can remember. A. He came to me and he asked 40

Samuel Blafer—Direct

me if I need goods for my store. I don't remember whether I did order any goods or not. Then he told me that he is interested in buying sugar, whether I know any wholesaler who would sell him sugar. Then I told him there is a man by the name of Greenberg was the day before in
 10 my store, and he asked me whether I know somebody who wants to buy sugar. I told him, "He may sell you sugar; go to him and he will sell you." He told me that he can't go to Greenberg because they ain't on good terms; his father failed, and he was mad with his father, not on good terms with his father; Greenberg isn't on good terms with Silberman's father.

Q. Whose father? A. Silberman's father.

20 Q. And you say that Silberman said he could not— A. (In English.) He couldn't go himself to Greenberg.

Q. He could not go to Greenberg? A. Yes.

Q. Because Silberman's father had failed and stuck Greenberg? A. Yes.

Q. And therefore Silberman— A. (In English.) Couldn't go to Greenberg himself. That is what he told me.

30 Q. Then tell us what happened? A. He told me I shall go alone there and I shouldn't tell him for who this order is, who wants that sugar, but I shall try and buy about one hundred barrels, and the price should be no more than five and ten, and then he will pay me for my time. I told him, "All right, I will do it for you; if he has any sugar, I will buy it; if he hasn't, I wouldn't." Then he took out a check for \$150. He says, "Here is the check, in case you do buy sugar." I took
 40 the check. I had customers; I attended to them,

Samuel Blafer—Direct

and he left the place. I took the check, and he stood there, and he wrote something on a piece of paper with his fountain pen; then he took out his fountain pen and he wrote something out on a piece of paper, and he told me to sign it; he said, "This is a receipt for the check." So I told him, "I can't write; I wouldn't sign it. You go to my wife and she will sign it." He was inside there with the baby. He took out a book; he left the papers and statements there, and he went over to her; she shall sign that receipt for the check. Then he went away. I thought he will come back. He went over to her, and I didn't see him any more; I didn't see him coming back any more. When he was in my place, when he gave me the check, he said that he will come here and I shall let him know whether I did buy sugar or not. I didn't see him any more. Whether the wife did sign or not, I don't know, but I didn't sign it. Then I went to Greenberg, I went over to Greenberg.

Q. I only want the conversation that took place at that place for the present. A. That is all there was said.

Q. He left the check with you at that time? A. Sure, he left it.

Q. At that time was he in a hurry or was he— A. He was very busy.

Q. He was in a great hurry? A. Yes, he was in a hurry; he was perspiring.

Q. Have you ever seen these (papers shown to witness)?

The Court: What are you showing the witness?

Q. Have you ever seen the papers marked D-1

Samuel Blafer—Direct

for identification? A. Sure, I seen it; I found it on the counter. I thought he will come, but he didn't come any more.

Q. Whom do you mean by "he"? A. Silberman.

10 Q. Silberman left these papers? A. Silberman left the papers on the counter and he went away.

The Court: These are statements that have nothing to do with this case, I understand. They were left on the counter by Mr. Silberman.

Mr. Siff: Yes, they were his accounts that he left when he went away.

The Court: Let them be marked.

Papers marked Exhibit D-1.

20 Q. Did you ever say to your wife, "Take that contract and sign it"? A. I never said that to her.

Q. Did you ever say to your wife, "Sign that contract"? A. No, sir.

Mr. Boardman: I object. That is a leading question, your Honor.

30 The Court: The words referred to, I believe, were contained in the testimony by a witness for the plaintiff. The question, then, is virtually this: Did you use these words which a witness for the plaintiff says you used? That, if it be called a leading question, is, I think, justified by the way in which it is preceded by testimony as to the language of the conversation. You may ask the question.

Q. (Question read.) A. No, sir.

40 Q. Exactly what did you say to your wife, if anything? A. She shall sign the receipt for the check that I received.

Samuel Blafer—Direct

Q. Did Mr. Silberman take the receipt to your wife? A. Yes, from my place he went over to her.

Q. And did she say anything to you? What, if anything, did she say to you?

Objected to.

10

The Court: What, if anything, did Mrs. Blafer say to her husband?

Mr. Siff: Yes, in the presence of Mr. Silberman.

Q. When Mr. Silberman went over to your wife, what, if anything, did your wife say to you? A. She asked me whether it is "necessary I should sign it—I shall sign it;" I said, "Sign the receipt."

Q. Now, are you in the wholesale business or in the retail business at Prince Street? A. Retail business. 20

Q. In August, 1914, were you in the wholesale business or in the retail business at your former place of business? A. Retail business.

Q. Are you able to fix the day when Silberman called at your place of business? A. It was early in the morning, on a Monday.

Q. Do you remember the date? A. I don't know; I don't remember.

30

Q. The day that Mr. Silberman left the check with you did you go to Mr. Greenberg? A. As soon as he left I went over to Greenberg, the same time.

Q. For what purpose did you go to Mr. Greenberg's? A. To ask him if he has any sugar, then I will buy it for Silberman.

Q. Did you purchase any sugar at that time from Mr. Greenberg? A. Yes, sir. 40

Samuel Blafer—Direct

Q. How much sugar did you buy from Mr. Greenberg at that time? A. One hundred barrels.

Q. Did you go there with Mr. Silberman's check, or did you take with you a personal check of your own? A. I took my personal check, because he told me that I shall not tell Greenberg that this is for him.

Q. How much was that check of yours for? A. \$50.

Q. Did you give that check to Mr. Greenberg? A. I did, I gave it to him.

The Court (to the interpreter): Tell him to answer these questions yes or no.

(The interpreter addresses the witness.)

Q. Did Mr. Greenberg accept or refuse that check? A. He took that check, and when he saw it is a \$50 check he started to laugh. He says, "For such amount of sugar you want to give me a deposit of \$50?" At the same time I left him the check, and I tried to go home and take some more money. Then I made out another check; I don't remember whether it was \$100 or \$50; and then I came with the second check. Greenberg looked at it, and he says, "That isn't enough."

Q. What did you do then? A. Greenberg told me, "You have got time until half-past four or five o'clock."

Q. To do what? "You have got time until half-past four" to do what? A. To go and look for more money, to give him the whole amount for the sugar; he doesn't want it on the installment plan.

Q. And what did you do then? A. I went around looking for Silberman.

Samuel Blafer—Direct

Q. And were you able to find him? A. I couldn't find him.

Q. What did you want to see Silberman for?

A. He shall give me more money for the sugar, because I couldn't get it all at once.

Q. Did you find Silberman? A. I couldn't find him. 10

Q. What did you do? A. I ran around up till five o'clock, because he told me if I wouldn't bring the money up by five o'clock, then he wouldn't sell any more sugar. I waited till five; I went around looking for him, and I couldn't get him. Then after five I took the check—

Q. Which check? A. The check that Silberman left me. —I took the check and gave it to my wife.

Q. Then, as a matter of fact, you did not buy or get any sugar from Mr. Greenberg that day, did you? A. Sure not; I didn't have the money. 20

Q. Then you do not mean that you bought any sugar from Silberman; you mean that you tried to buy sugar from him?

Objected to.

The Court: If the witness will confine himself to a statement of the facts, the Court and jury will be able to draw the legal conclusion as to whether a sale existed. The witness's testimony as to whether there was a sale or not is testimony as to a conclusion of law, which he is not the best person to draw. 30

Q. For what purpose did you give to your wife the Silberman check at five o'clock? A. I gave her the check to take it over to Silberman and to tell Silberman that I bought sugar of Greenberg, but Greenberg wants the full amount. I run around to get Silberman, but I couldn't get him. 40

Samuel Blafer—Direct

The Court: The witness is off the question. The question is, "Why did you give this check to your wife"?

Witness: She shall take it over to Silberman.

Q. And did she leave with the check? A. Sure.

10 The Court: Ask him if that was the same day when Silberman gave him the check or whether it was the next day?

Witness: The same day.

Q. Now, did your wife return that night? A. Yes, she came home.

Q. And had she given him the check?

The Court: Well, he could only know that by what she told him, and he cannot testify to what she told him.

20 Q. What time did she get home? A. Late that night.

Q. How late, what time was it? A. Around 12 o'clock.

Q. Did you or did you not send your wife back with the check? A. Yes, sure I did.

Q. When? A. The next day, in the morning, at 6 o'clock.

Q. And she left with the check? A. Yes, sir.

30 Q. Has any demand ever been made on you for one hundred barrels of sugar? A. Nobody made any demand.

Q. Did Silberman ever come to your place of business and ask you to deliver the hundred barrels of sugar? A. No, sir.

Q. Did anybody else come— A. No.

Q. —and demand of you one hundred barrels of sugar? A. No.

40 Q. For Depew & Company? A. No, I didn't see anyone.

Samuel Blafer—Direct

Q. Did anybody ever come to you and offer you a check or money for one hundred barrels of sugar? A. No, sir.

Q. Did you receive that letter (paper shown to witness)? A. Yes, sir.

The Court: What is that, Mr. Siff?

Mr. Siff: That is Exhibit P-3.

10

The Court: The witness being shown Exhibit P-3, is asked—

Q. Did you receive that letter? A. Yes, sir.

The Court: He says he received it.

Mr. Siff: Yes, sir.

Q. And what, if anything, did you do when you received that letter? A. Put it away.

Q. You paid no attention to it? A. I don't know these people; I haven't anything to do with them; I never saw them.

20

Q. Did you receive this telegram marked Exhibit P-4 (paper shown to witness)? A. Yes, sir.

Q. What, if anything, did you do when you received the telegram? A. I put it away, put it in the same place where the letter was; I put it away.

Q. You paid no attention to them? A. No, sir; I have nothing to do with them.

Q. Can you read English? A. No, sir.

30

Q. Can you write English? A. No, sir.

Q. Did you ever tell your wife to sign this (paper shown to witness)?

The Court: What is "this"?

Q. Did you ever tell your wife to sign the paper marked Exhibit P-1? A. No, sir; I didn't see that paper; I saw a plain paper, a different paper.

Q. Can you read this? A. No, I cannot.

40

Samuel Blafer—Cross

Q. Did you ever see this paper before? A. I didn't see it.

Q. Did you ever see this paper, marked Exhibit P-2 (paper shown to witness)? A. He wrote on a piece of paper similar to that, but I didn't look at it.

10 Q. What did he tell you it was? A. A receipt for a check.

Q. That is the paper you meant when you told your wife to sign? A. I told her, because he said this is the receipt for the check.

Q. Did he read that receipt to you? A. No, sir.

Q. Just wrote it and— A. He told me he wants that receipt signed for the check.

20 Q. Did he read it to you? A. No, sir.

CROSS-EXAMINATION by Mr. Boardman:

Q. Mr. Blafer, that paper marked Exhibit P-2 is the receipt that your wife signed (paper shown to witness)? A. I didn't see what she signed; all I saw, that he wrote it down. He showed me that paper, and he took it over to her. I didn't see her sign it. He went over there himself; I tended to customers.

30 Q. Look at this. Do you know what that is? A. There is something written there; I don't know what it is.

Mr. Boardman: I am calling his attention to the signature.

Q. Look at this paper. Do you know any part of this paper? Can you read any part of it? A. Only figures; I see "1, 9, 1, 0, 1, 4."

Q. You can read figures? A. Yes.

40 Q. Do you see the figures on this paper, marked P-1 (paper shown witness)? A. Yes.

Samuel Blafer—Cross

Q. Do you see the figure "100"? A. I think it is a "10."

Q. Over here at the right (indicating)? A. "\$10."

Q. And what are those figures at the left (indicating)? A. A "5" and a "1" and a "6," or a "0;" I don't know. 10

Q. And what does that mean? A. I think it is \$510.

Q. And here are some figures at the top (indicating). What are these figures? A. "1, 0, 1, 9" and "1, 4."

Q. Do you not know that that is August 10, 1914? A. I don't know; you just said; I don't know.

Q. Don't you know dates? A. I don't know. 20

Q. Here are some figures (indicating). What is that in the middle? A. I see a "2" there.

Q. And what is after it? A. Two round little things; I don't know.

Q. And what is this (indicating)? A. I don't know.

Q. At the very bottom of this paper, look at this (indicating). Do you know what that writing is? A. I don't know; it is strokes with a pen and rings.

Q. Do you know your wife's signature? A. I don't know. 30

Q. Do you know how to make any signature or mark of your own? A. In Yiddish.

Q. How do you sign things?

Mr. Macdonald: It is hardly immaterial how he signs it in Yiddish. I do not see why we should waste time.

The Court: The question is whether he can sign. 40

Samuel Blafer—Cross

Mr. Macdonald: Did I not understand him to say that he could sign it in Yiddish?

The Court: I daresay he may have said so.

Mr. Boardman: Yes.

10 The Court: Counsel is entitled to ask him questions.

Mr. Macdonald: There is no question but that the wife signed some papers or other.

Q. Can you read Yiddish? A. A little.

Q. Are not a good many words the same in Yiddish as in English? A. I don't know. I don't know English; I know Yiddish.

20 Q. Are the figures the same in English as in Yiddish? A. That is the figures I studied at home; all I know is Yiddish figures.

Q. Well, these are the same kind of figures used in Yiddish, are they not (paper shown to witness)?

The Court: Showing the witness what paper?

Mr. Boardman: Showing the witness Exhibit P-1.

A. Yes, they are figures.

30 Mr. Boardman: I would like to have the witness write the figures up to 10 in Yiddish.

Mr. Siff: I object to this, your Honor. It is wholly improper. I do not see the competency of it.

The Court: Do you object to the witness's doing it?

Mr. Siff: I do not see any relevancy.

40 The Court: I will not direct the witness to do it if you object to it.

Samuel Blafer—Cross

Mr. Siff: If Mr. Boardman will show me the relevancy of it, I will not object to it.

Mr. Boardman: To show the similarity of it and to show that these are the same figures as he uses in Yiddish.

Mr. Siff: I do not see the competency of that. 10

The Court: The only question is whether you consent to it.

Mr. Siff: If there was any purpose in it, I would not have any objection, but, under the circumstances, I will object.

Q. You say you went to Greenberg's after Silberman left you? A. Yes.

Q. And you bought a hundred barrels of sugar? 20

Mr. Siff: I object to the form of the question, your Honor, on the ground that it calls for a conclusion of law. It is very evident from the witness's testimony.

The Court: There was some transaction between Mr. Greenberg and the witness. If you want to go into that—

Mr. Boardman: I do not want to go into that.

Q. But there was a transaction between you and Greenberg, was there not? A. I told him I will buy sugar; I need it for somebody. He knows that I don't need so much sugar. I told him I need it for somebody; I will tell him later. 30

Q. Now, how much? A. 100 barrels.

Q. At what price? A. I don't remember the price exactly; I think I bought it for the price that he told me to.

Q. Well, what price, as near as you can remem- 40

Samuel Blafer—Cross

ber? A. It is a long time ago; I don't know. The same price as he told me.

Q. No, but what price did you agree with Greenberg for, as near as you can remember? Was it \$5 or \$6? A. I don't remember.

10 Q. Well, but I want it as near as you can remember. A. I don't remember; I only remember the price that he told me.

Q. Well, what was the price that he told you?

By the Court: Q. Interposing. Whom do you mean by "he"? A. Silberman.

Q. What was the price that he told you? A. I don't remember that, either.

Q. Well, you just said that you did remember that. A. I think he told me five, ten, and the same price I offered him.

20 By Mr. Boardman: Q. Did you not get a better price from Greenberg—cheaper? A. I think the same price as he told me.

Q. Why did you take him \$50? A. Because he told me I shall not give him his check; I shall give him my own check. "Afterwards, when you buy it, you dare tell him; afterwards you may tell him it is for me; before don't."

30 Q. Why did you take \$50 to him? A. I took that much.

Q. Why? A. I don't remember; I don't remember how it came out I took that much.

Q. Why did you keep \$100 of the check that you had received? A. I didn't touch that piece of paper; it was the check the same way as he gave it to me and the same way I left it there.

Mr. Siff: I do not understand whether the witness understands the question or not.

Samuel Blafer—Cross

Q. Mr. Silberman gave you a check, did he? A. Yes, sir.

Q. Into your hands? A. Yes.

Q. Did you look at it? A. He told me, "This is a check for \$150."

Q. Did you look at it? A. I put it away, that is all. 10

Q. Did you not look at the \$150? A. I didn't notice that; I was busy.

Q. Whose check was it, do you know, that Silberman gave you? A. I don't know; I think it was Silberman's. He gave me the check; I didn't look whose it was.

Q. Whose check did you take to Greenberg? A. My own.

Q. Who signed it? A. My wife.

Q. Does she sign all your papers? A. Only checks. 20

By the Court: Q. And did your wife sign the other checks that you took to Mr. Greenberg? A. Yes, sure.

Q. How many were there all together, three? A. Two.

Q. There was the \$50 check, and what was the other? A. One was for \$50 and the other was \$100, I think; I don't remember exactly.

Q. Did you say \$30 or \$50? A. \$50; the first was for \$50; and the other was for \$100. 30

Q. And your wife signed them both? A. Yes.

By Mr. Boardman: Q. Who wrote the rest of the checks? A. She herself. I don't write any checks.

Q. You do not write any papers, do you? A. I only sign in Yiddish.

Q. You do not write any papers, do you? A. In Hebrew I can. 40

Samuel Blafer—Cross

Q. You took to Greenburg a second check of \$100; is that right? A. I think so; more or less; I don't remember, but I think it was \$100.

10 Q. And when you took that \$100 did you take the \$50 with the \$100 and offer him \$150? A. I left the \$50 before there, and then I came with this check; he returned me the other check also, and then he told me I shall bring the full account.

By the Court: Q. Then what became of those two checks that you gave Greenburg? A. When I sent my wife to Greenberg with his check I gave her these two checks to show him that we offered Greenburg the checks, but he wanted more money.

20 Q. The question is what became of these two checks, the check for \$50 and the check for \$100? A. She left the two checks in Greenberg's; she gave him his check and she gave him these two checks.

Q. And who has them now? A. I haven't got them.

Q. Greenburg did not give them back to you? A. Greenburg gave them to me immediately; they remained in Silberman's.

30 Mr. Macdonald: He did not mean Greenburg's; he meant Silberman's.

Mr. Siff: When his wife took Silberman's check and returned it she also took the other two checks with her to show that they had made an effort to buy the sugar, and we will show by her just exactly what was done with the check. He has no personal knowledge.

40 The Court: The witness is now understood to say that they were returned to him.

Samuel Blafer—Cross

By Mr. Boardman: Q. Mr. Blafer, did your wife go to Greenberg? A. I went there myself.

Q. Then it was you who took these checks which your wife had signed, was it? A. Yes, sure.

Q. And what did you do with those checks, those checks signed by your wife? A. I went to Greenburg. 10

Q. Did Greenberg keep them? A. Sure, he kept them.

Q. That same day, you say, your wife came back at twelve o'clock, p. m.? A. Yes.

Q. Did she have the Silberman check with her, then? A. Yes.

Q. Have you seen that Silberman check since that night? A. I saw it in the morning before she left; I sent her with the check. 20

Q. Have you seen it since that time? A. No, sir.

Q. Who was present when Silberman came in to you that morning, who was there? A. There were customers; a few salesmen were there. It is an open place; it is a stand in the market, I couldn't watch every one who was there.

The Court: Mr. Blafer when, you are asked a question by one of these gentlemen I want you to answer that question and then stop, and not go on and talk about other things. (To the interpreter.) Just tell him that. 30

(The interpreter addresses the witness.)

Q. Was Mrs. Blafer, your wife, there? A. Yes.

Q. Was David Schleier there?

The Court: Yes or no. Was he there?

A. Yes, he was there.

Q. Mr. Blafer, I show you this yellow sheet marked D-3 for identification (paper shown to 40

Samuel Blafer—Cross

witness)? Have you seen this before? A. Yes, when I received the paper from the court, then I looked for it, and I found it in the register. I didn't know I had it; I didn't know what it was.

Q. At the bottom there are some letters. Can you read them? A. No.

10 The Court: What is this, a receipt?

Mr. Boardman: This, your Honor, is what has been marked D-3 for identification.

Q. Do you see those figures at the left (indicating)? A. Yes.

Q. Do you see these figures at the right (indicating)? A. Yes, "5, 1, 0."

Q. When you got your court paper, Mr. Blafer, who was it that got this out, was it you? A. I found it myself.

20 Q. Why did you look for it? A. I didn't look for it; afterwards I found it.

Q. Well, what were you looking for?

Mr. Macdonald: If the Court please, it is highly immaterial and incompetent and a mere waste of time—all these questions.

The Court: I will allow it.

A. I cleaned the register and I found it there.

30 Q. It was after you got the paper from the court? A. I think it was after.

Q. Do you know when you first got that paper? A. I don't know; I didn't know until I found it.

Q. Was it you who put it away in the register?

40 Mr. Macdonald: One moment. This paper is not in evidence. The examination is a waste of time, and it is entirely irregular. Counsel has no right to use papers which have not been put in evi-

Samuel Blafer—Cross

dence, and he knows it perfectly well, and it does not bear on the issue at all.

The Court: The paper has been marked for identification.

Mr. Macdonald: That is all.

The Court: The defendant has used it and is bound to offer it when the time comes, and therefore I think an inquiry as to the paper is not improper. 10

Mr. Macdonald: It is not relevant to this issue when this paper may have been found or what purpose the party had after he was sued in searching for the paper. That is not relevant to this issue whatever. The paper is not an original paper.

The Court: I do not desire to discuss this matter any further. I think the inquiry about the paper is perfectly proper. 20

Defendant's counsel pray an exception to this ruling of the Court.

Exception noted as ground of appeal.

Q. You say you found this yourself in your register, Mr. Blafer? A. Yes, sir.

Q. Why did you take it out? A. I took out other papers; I wanted to know what it was; I took out other papers, and I read them also— some papers I put down the names of customers, and so on. 30

Q. And you read this one? A. I asked a boy; he read it over to me.

Q. What boy, Schleier? A. No, a customer was there.

Q. Mr. Blafer, have you bought or sold sugar besides these Silberman and Greenberg transactions of August 10th, in August, 1914?

Objected to. 40

Samuel Blafer—Cross

The Court: What is the object of the inquiry?

10 Mr. Boardman: Twofold: to show that the defendant was acquainted with sugar conditions from other purchases and sales, and also tending to show the price at nearby times.

The Court: If you want to ask him any questions about the market price, you can do that. I do not see anything else that justifies this inquiry.

Q. How often do you buy sugar, or did you buy sugar in last August?

Objected to.

20 The Court: It seems to me to be immaterial, unless it is asked for the purpose of developing his knowledge of the market price.

Mr. Boardman: Yes, it is for that purpose.

The Court: For that purpose I would allow it.

A. Whenever I didn't have sugar I had to buy it; I don't know when.

30 Q. And how many times was that, once or twice, or three times? A. I don't remember how many times.

Q. Did you buy sugar at all in August, 1914?

A. I don't know; I don't know if I bought or not.

Q. Do you know the price of sugar in August, 1914?

Mr. Macdonald: What day? August has thirty-one days. What is the use of wasting time in asking vague questions.

40 The Court: On any day in August.

Samuel Blafer—Cross

Mr. Boardman: The price on August 13th.

Witness: I know I sold paper sugar for 19 cents three and a half pounds.

The Court: Perhaps the witness did not understand the question, whether he knows what the market price was, the price in the market was. 10

Mr. Macdonald: I think the answer is responsive.

Witness: I don't know what "market price" means. I used to sell paper sugar; I had a stand in the market.

Q. Do you know the meaning of "market price"? A. They put out the sign on a paper; that is the market price. 20

Q. Do you know the meaning of "wholesale price of sugar"? A. That is what they charge me, that is the price.

By the Court: Q. Well, do you know what the wholesale price was on the 13th day of August? A. I don't know; I can't remember a year, what price it was then.

The Court: I do not think it is worth while to spend any more time on that with this witness. 30

By Mr. Boardman: Q. You have bought sugar from the refineries, have you not? A. No, sir.

Q. Do you buy from a jobber? A. Salesmen come to the store, and I bought it off of them.

Q. When? A. Every day. We have a lot of salesmen; sometimes I buy of one and sometimes of the other.

Q. Do you buy through a broker by the name of Henry? A. What do you mean by that? A 40

Samuel Blafer—Re-direct

good many salesmen come around there. I don't know him. If you will show him to me probably I will know him. I don't know the name "Henry."

10 Q. Do you buy from the Federal Sugar Refining Company? A. I don't know them. Who are they?

Q. Or through the Warner? A. I never heard such names.

Q. Do you carry on your store there alone, or do you have a partner? A. My wife is my partner; she is in the store, not anybody else.

Q. She signs all papers for you? A. No, sir; only checks.

20 Q. She is your general adviser, is she not? A. No, sir.

Q. Is she in partnership with you? A. She is my wife and the store belongs to her as well as to me.

Mr. Siff: I think he said, if I am correct, "My wife," that is all.

The Interpreter: "She is my wife and the store belongs to her as well as to me."

Mr. Siff: I did not hear the last part of it.

30

RE-DIRECT-EXAMINATION by Mr. Siff:

Q. When you say that the store belongs to your wife as well as to yourself, do you mean that you and your wife are partners or the business is yours? A. The business is mine. What is the difference from her to me? I don't pay her any wages and she doesn't pay me.

40

The Court: I understand the witness's position is that his wife is his general adviser, and I think that is always true.

Samuel Blafer—Re-direct

Q. Now, with reference to your personal checks. Did you get those back from Greenberg—your two checks? A. Yes.

Q. Before that I would like to ask you, how many checks did you leave with Greenberg, one or two? A. One.

Q. And you got that check back from Greenberg? A. Yes. 10

Q. And what did you do with those two checks after you left Greenburg? A. I brought these two checks home, and I sent my wife with the two checks and with the other check to Silberman, and that she shall tell him that I bought the sugar, but I couldn't get it, because I couldn't find him.

By the Court: Q. Well, where are those two checks now? A. Silberman has them. 20

By Mr. Siff: Q. Now, when you handed those checks to your wife to take them to Silberman was your signature on both of those checks? A. No, sir.

Q. What has become of the signature on the checks?

The Court: First let us have this question answered: When you gave those checks to Mr. Silberman were the signatures on them? Say yes or no. 30

Witness: No, they were torn off. I didn't use them in Greenberg's, and that is the reason I tore off the signature.

Q. Now, you testified that David Schleier was there. What was David Schleier doing there? A. He attended to the customers.

Q. Was he doing anything else? A. He attended to customers; I sent him out with an 40

Samuel Blafer—Re-direct

order, or anything else. He did everything that I told him to.

Q. Was there anybody else present, can you recall, besides yourself, Mrs. Blafer, David Schleier and Mr. Silberman? A. Yes, somebody else was there.

10 Q. Who else was there? A. Sternberg was there. He is a salesman; he sold salt; he sold me salt at that time.

Q. Any one else? A. I don't remember; I remember when he was there.

By the Court: Q. Who is Sternberg? A. He is a salesman.

Q. What is his first name? A. I don't remember his first name.

20 Q. Is he here? A. (Witness indicates a man in the court room.)

The Court: Will Mr. Sternberg stand up, if he is here?

(A man arises.)

Q. Is that the man? A. Yes, that is him.

By Mr. Siff: Q. Do you say you can write Yiddish? A. Yes, sir.

Q. Did Mr. Silberman ask you to sign your name in Yiddish? A. No.

30 Q. Did he ask you to sign your mark to either of those papers? A. No.

Juror No. 12: May I ask the witness a question, your Honor?

The Court: Yes.

By Juror No. 12: Q. Have you ever done any business with E. D. Depew & Company at all?

A. I used to buy goods from them several times
40 for the store when I needed it.

Ida Blafer—Direct

IDA BLAFER sworn in behalf of defendant:

Direct-examination by Mr. Macdonald:

Q. Mrs. Blafer, you are the wife of Samuel Blafer? A. Yes, sir.

Q. Who has just been on the stand? A. Yes, 10
sir.

Q. Do you remember this morning in August, 1914, when Silberman came there and there was some talk about sugar? A. Yes, sir.

Q. What time of the morning was that? A. Between seven and eight.

Q. In the morning? A. In the morning.

Q. And Mr. Silberman came in the store of your husband? A. Yes, sir.

Q. And were you there when he came in? A. 20
Yes, sir.

Q. And who else were there besides your husband and yourself? A. The little boy.

Q. Schleier? A. Schleier; yes, sir.

Q. And anybody else? A. Mr. Sternberg.

Q. Was there anyone else there? A. No; there was some customers.

Q. Did you hear the conversation between Silberman and your husband? A. I heard something. They were talking about sugar, and my husband mentioned the name of Mr. Greenberg. 30

Q. Now, tell us exactly all of the conversation that you heard. A. I was tending to the customers in the back of the store, and then I saw Mr. Silberman was talking something to my husband; they were talking about sugar, and that my husband will get sugar of Greenberg. That is what I heard. I was tending to my customer there after Mr. Silberman came over to me. He says. 40

Ida Blafer—Direct

10 “Sign the receipt. I gave your husband a check.” So I asked—from far I asked my husband, “Shall I sign it—the receipt?” And he says, “Yes,” and I signed it. And then he came over. He says, “This is for you, and one will be for me,” and he signed one for him and one for me.

Q. Now, that same day did you draw two checks for your husband to take to Greenberg? A. Yes, sir.

Q. What was the amount of the first check? A. A \$50 check.

Q. And do you remember the amount of the second check? A. I think it was about \$100 or over; I don't know.

20 Q. And did your husband come back from Greensberg's and give you those checks in the afternoon? A. Yes.

Q. Did he leave the signature on the bottom, or not, when he gave them to you?

Objected to.

A. When he came from Mr. Greenberg?

The Court: One moment.

Mr. Boardman: It seems to me these questions are decidedly leading.

30 The Court: Perhaps so, but I see no particular objection to them.

Q. (Question read.) A. Well, when he came back he tore off, and he said I should go to Mr. Silberman and tell him that he couldn't get the sugar for him, because he didn't have enough money.

40 Q. Now, when he gave you those two checks that you had signed to take and show to Silberman, did he give you any other check to take to

Ida Blafer—Direct

Silberman? A. Yes, his check—Mr. Silberman's.

Q. The check that Silberman had left with your husband in the morning? A. Yes, sir.

Q. And did you go to find Silberman? A. Yes, sir.

Q. Where did you go? A. In his house I came. It was about five or after five. I went there, and I couldn't find him home; I found his mother. 10

Q. Was that the same day? A. The same day.

Q. Now, tell us all that you did. A. Yes, sir. When I came to Mr. Silberman's house I didn't find him home; I found his mother, so I told his mother that I—

The Court: Never mind what you told his mother. 20

Witness: Well, I didn't find him home.

Q. Then go ahead and tell us—A. So I was waiting till twelve o'clock at night, and I couldn't wait any longer; I didn't see him yet, so I went home. The next morning, six o'clock, I got up, and I went with the three checks to his house. I knocked at the door. It was too early yet, so they didn't open till seven. Seven o'clock his mother opened the door. I came in in the house, and his mother says that he will get up soon. 30

The Court: Never mind about his mother. You may tell us anything that Mr. Silberman said to you or you to him.

Witness: He got up and sat down by the table, and I said, "Mr. Silberman, here is your check," and I gave him the two checks what my husband went to Mr. Greenberg and I showed to him, and I said that he couldn't get the sugar for him, because he didn't have enough money; he was look- 40

Ida Blafer—Cross

ing for him the whole day. And so he said, "What do you say?" I said, "Here is your check;" and then he smiled, and he said, "All right," and I went home. When I went out he opened the door, and he said, "You left Greenberg's check, too." 10 I said, "I don't need it, because my husband tore off the signature." That is all.

CROSS-EXAMINATION by Mr. Boardman:

Q. When you were there at Mr. Silberman's house the first day, what did you do? Whom did you see besides his mother, anybody? A. Nobody.

Q. And where did you wait? A. In the house.

Q. And you waited until midnight? A. Twelve o'clock.

20 Q. What did you do all that time? A. I was waiting for him, for Mr. Silberman.

Q. What were you doing? A. To give him back the check.

Q. The next morning what time did you go there? A. Six o'clock in the morning.

Q. And you stayed until seven o'clock or later? A. What?

Q. You stayed until seven o'clock or later? A. Till seven I was there; he got up seven o'clock.

30 Q. Why did you leave the checks there? A. To show him that he hasn't got enough money. He was looking for him. I showed him the check, that Mr. Greenberg refused to give him the sugar because he hasn't got so much money.

Q. What do you know yourself about Greenberg? A. Well, that is what I heard my husband was talking to Mr. Silberman about Greenberg.

Q. And do you say that there were two checks 40 left with Mr. Silberman? A. Yes.

Ida Blafer—Cross

- Q. Two checks or more than two? A. Three.
- Q. And what were those three? A. One was Silberman's check and two—
- Q. How much was that, do you know? A. I know it now; \$150.
- Q. Was anything torn off of that check? A. 10
What, of the \$150 check?
- Q. Yes. A. No.
- Q. What other check was there? A. Greenberg's, made out to Greenberg, two checks.
- Q. Who made it out? A. I made it.
- Q. You wrote it all? A. Yes.
- Q. And how much was that for? A. One was \$50, and the other was, I think, about \$100, about \$100; I don't remember exactly.
- Q. And they were both torn? A. The signature? 20
- Q. Yes. A. Yes, sir.
- Q. Whose signature was it? A. My signature.
- Q. How did you sign those checks? A. "Sam Blafer; Ida B'lafer, Attorney." That is what they told me in the bank, I should sign it this way.
- Q. To whom were those checks made out that you had signed? A. Which, the two checks?
- Q. Yes. A. For Greenberg. 30
- Q. What is his name? A. Whose name, Greenberg?
- Q. Yes. A. Greenberg; that is what I know.
- Q. What is his first name? A. I don't know.
- Q. What did you write on the check, just "Greenberg"? A. "Greenberg," or I don't remember what kind of letters it was.
- Q. You heard the conversation between Mr. Silberman and your husband when this check 40

Ida Blafer—Cross

was given by your husband to Mr. Silberman?

A. I didn't hear everything, because I was attending to a customer.

Q. But you heard part? A. Yes, I heard them mention Greenberg's name and sugar.

10 Q. Did you hear anything besides Greenberg's name? A. What?

Q. Did you not hear anything besides Greenberg's name? A. No.

Q. What did they say about Greenberg? A. That he should get sugar for him; that is what I know now.

Q. Well, did you not hear it then? A. Before I heard something about sugar and Greenberg.

Q. And who said to get sugar from Greenberg?

20 A. Mr. Silberman.

Q. And why—A. Mr. Silberman told my husband he should get sugar for him.

Q. And what did your husband say? A. Well, I wasn't near there; I couldn't hear everything.

Q. You did not hear much except the name "Greenberg?" A. Greenberg, and that he should get sugar for him, that is all.

Q. Well, why were you so anxious to give back these checks, or this check? A. Why?

30 Q. Why did you wait so long for Mr. Silberman that same night? A. Because I wanted to give him back; my husband told me, "Today I shall give him back;" so I was waiting there.

Q. But why? A. Because my husband told me so.

Q. Why did you want to give them back? A. My husband told me I should give him back, so I was waiting, and I thought he will come in nine
40 o'clock, ten o'clock, and I was waiting till twelve.

Ida Blafer—Cross

Q. If it was only an accommodation, why were you so anxious to give them back? A. Because my husband told me I should give him back, so; that is why I was waiting there.

Q. And that is all you know of the reason? A. That is all I know, sure.

By the Court: Q. Mrs. Blafer, do you remember signing a receipt? A. Yes. 10

Q. What was that a receipt for, do you remember? A. A receipt for a check; that is what Mr. Silberman told me.

Q. Did you sign any other paper? A. Another little paper.

Q. What? A. A little paper.

Q. What was that? A. From his book; he says that is for him and the paper for me, and I put it in my pocket. 20

Q. The little paper from his book that you signed, do you know what that was? A. A receipt, he told me, a receipt for him and a receipt for me.

Q. And the receipt was for the check? A. Yes.

Q. You kept that? A. Yes, sir; after I gave it to my husband, he should put it away.

Q. You gave the receipt? A. Yes, sir.

Q. To whom? A. To Mr. Silberman.

Q. I mean the receipt for the check? A. Yes, sir. 30

Q. You gave that to Silberman? A. Yes, sir.

Q. And the other paper that you signed—A. The other paper was for him, and the other little white paper was for me.

Q. Were they both for you? A. He told me I should sign two of them.

Q. Where is the little paper for you? A. 40

Ida Blafer—Cross

I don't know. He told me I shall sign them, one slip for him and one for my husband.

Mr. Boardman: Do you mean this D-1 and D-2?

Witness: He told me I should sign here.

10 Q. Which was the paper for you? A. I signed them.

Q. Which paper was the one to you? A. I think this one—no, the other one, I think. I don't remember (indicating.)

Q. Pick it out; take your time. You can read? A. I don't remember.

Q. You read English, do you not? A. I read a little. I don't remember which he told me will be for him and which will be for me. I signed
20 two receipts.

By Mr. Boardman: Q. This is D-3 (paper shown to witness.) Look at the bottom. Is that your—A. I can't read it.

Q. It is rather faint, but is it not your signature? A. Yes, I signed it.

Q. I mean did you write that? A. Yes, sir.

By the Court: Q. Is that the one that was for you? A. I don't remember exactly which.

Mr. Boardman: Look at the bottom line
30 of it.

Witness: I didn't see this one.

Q. Look at P-1 and see if that is your signature (paper shown to witness)? A. Yes.

Q. Was that for him? A. I don't remember exactly which one it was.

Q. Well, you signed that, at any rate? A. Yes, I signed it.

By Mr. Boardman: Q. Now, here is D-2. Look
40 at the bottom of that (paper shown to witness.)

Solomon Sternberg—Direct

That is what you wrote there? A. No, I didn't write this; that isn't mine.

Q. I mean the signature at the bottom. A. Yes, I didn't see the marks on it.

Q. See what that is, Mrs. Blafer. A. I recognize the signature; that is all I see.

The Court: That is all you are asked about. 10

Witness: He told me to sign it; he didn't read it; he told me to sign two receipts, and so I signed them.

SOLOMON STERNBERG sworn in behalf of defendant:

Direct-examination by Mr. Macdonald: 20

Q. Mr. Sternberg, where do you live? A. 273 Belmont avenue.

Q. And what is your business? A. Now?

Q. Yes. A. I am agent for the Prudential Insurance Company.

Q. Now, in August of last year what was your business? A. I was selling salt for Nathan Zemel.

Q. Do you know Samuel Blafer, the defendant here? A. Yes. 30

Q. And do you know Mr. Silberman, who has been on the stand in this case? A. Yes, sir.

Q. Do you remember meeting Mr. Silberman at Mr. Blafer's place of business in August, 1914? A. Yes, sir.

Q. Can you tell what date it was in August? A. It was the early part of August, on Monday.

Q. Did you hear any conversation between Mr. 40

Solomon Sternberg—Cross

Silberman and Mr. Blafer at that time? A. Yes, sir.

Q. Will you state to the Court and jury what that conversation was? A. Yes, sir.

The Court: Go on and tell us.

10 Witness: Your Honor, Mr. Silberman asked Mr. Blafer if he knows if anybody has got any sugar for sale. Mr. Blafer said, "Yes, I do know;" and he asked him who has got it, and then he said, "I know that Mr. Greenberg has got some sugar for sale." Then Mr. Silberman said to Mr. Blafer if he can purchase the sugar for him, because he thinks that Mr. Greenberg will refuse to sell him sugar on account of ill-feeling between him and Mr. Greenberg. Mr. Blafer said he is willing to do it, to buy the sugar for him from Mr. Greenberg. Mr. Silberman asked him 20 to pay not more than \$5.10 per hundred, which Mr. Blafer promised to do so. At the same time Mr. Silberman handed a check to Mr. Blafer as a deposit in case he will buy any sugar for him. Mr. Blafer took the deposit of Mr. Silberman—I mean the check—and he hollered for Mrs. Blafer, she should give him a receipt for the check, which she did.

30 Q. Was there anything else said in that conversation about the firm of Edward D. Depew & Company, of New York City? A. I don't think so.

CROSS-EXAMINATION by Mr. Boardman:

Q. Do you know Mr. Silberman? A. Yes, sir.

Q. And you knew him before that time? A. Yes, sir.

40 Q. Did you know what business he was in—whom he worked for? A. Yes, sir.

Solomon Sternberg—Cross

Q. For whom? A. For Depew & Company.

Q. Did Silberman ask Blafer or did Blafer ask Silberman for the name of a sugar seller?

A. Silberman asked Blafer; he told Mr. Blafer that he would like to buy some sugar and if he knows anybody that has got it to sell.

10

Q. That is what Silberman asked? A. Yes, sir.

Q. Did you buy any sugar of Blafer in August, 1914? A. That is out of the question.

Objected to.

The Court: Whether he bought any sugar of Silberman? A. What is the point of that, Mr. Boardman?

Mr. Boardman: Why, in this question, the same as in the questions before, I wish to show that Blafer was buying and selling, that he was able to sell and that he did sell sugar at a time which is so near that it has a bearing on this case.

20

The Court: I think it is irrelevant. He had a right to buy and he had a right to sell. The question is whether he did in this case.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

30

Q. How long were you in that store that morning, Mr. Sternberg? A. I have been waiting for my next. When one salesman comes in a place and another salesman is doing business with a man, he is waiting for his next.

Q. Waiting for his turn? A. Yes, sir; waiting for my turn.

By Mr. Macdonald: Q. Waiting for your turn to speak to Blafer? A. Yes.

40

Solomon Sternberg—Cross

By Mr. Boardman: Q. Were you waiting there before Mr. Silberman or did you come in after? A. I came in and I find Mr. Silberman there.

Q. You found him there? A. Yes, sir.

10 Q. Mr. Silberman was doing business with Blafer when you came in? A. Yes, sir.

Q. How near to Silberman and to Blafer were you when you heard this conversation that you have testified to? A. Well, I am not an engineer to measure.

Q. As near as you are to me? A. They have been talking business around the counter.

Q. How near? A. Well, you know about how near it is from the front counter to the man that stands behind the counter.

20 Q. So near (indicating)? A. Yes.

Q. Where was Mr. Silberman? A. In front of the counter.

Q. Where was Mr. Blafer? A. Behind the counter.

Q. And where were you? A. I was standing in front of the counter.

Q. And how near Mr. Silberman? A. Well, I should say about two yards or a little more. You know what it is.

30 Q. Anybody between? A. I couldn't say exactly.

Q. Where was Mrs. Blafer? A. She was on the other end of the counter.

Q. How far away? A. Well, I should say about 12 or 15 feet or 16 feet.

Q. And did you stay in that position while you were there? A. Sir?

40 Q. Did you stay in that position while you were there? A. Did I stay in that position?

Solomon Sternberg—Cross

Q. Yes. A. Well, I have been standing there.

Q. Which went out first, you or Silberman?

A. Mr. Silberman.

Q. Did you have any conversation with Mr. Blafer about this sugar, or this deal, after Mr. Silberman had gone out? A. No, sir.

10

Q. Mr. Blafer did not say anything to you about it? A. No, sir.

Q. How long was Mr. Silberman there? A. Oh, I think about twenty-five minutes, twenty minutes, maybe a little longer.

Q. Do you know how long Mr. Silberman was there before you came? A. I didn't pay very much attention to that. What is your question, please?

Mr. Boardman: That is all.

20

By the Court: Q. Mr. Sternberg, I understood you to say that you saw Mrs. Blafer sign a receipt for the check that Mr. Blafer had; is that right? A. Yes, sir.

Q. Where was she when she signed it? A. Well, I was in front of the counter.

Q. Well, did she write on the counter? A. She was writing on the other place.

Q. On the counter? A. Yes, sir.

Q. Did you see her sign anything else? A. No, I saw she signed; that is all.

30

Q. That you recognize, perhaps? (Paper shown to witness.) A. I can't recognize anything.

Q. You can't recognize anything? A. No.

Q. What is the trouble, is there anything the matter with your eyes? A. Oh, no. I didn't pay no attention to that, that I should see what paper Mrs. Blafer should sign.

40

Solomon Sternberg—Cross

Q. Well, you say you saw her sign a receipt?

A. I see she was signing, but I don't know what paper she was signing.

Q. You cannot say whether it was a receipt or not? A. No, sir; I can't say if it was for a receipt or something else.

10 Q. Well, when you say you saw her sign a receipt, you mean you saw her sign a paper, but you do not know what it was; is that it? A. I should say she signed a receipt, but I couldn't recognize that as the receipt.

Q. How do you know that she signed a receipt? A. Because Mr. Blafer requested her to sign a receipt.

Q. What did Mr. Blafer say? A. He hollered
20 to her to sign a receipt.

Q. What did he say? A. He said to her in Yiddish. "Ida, sign a receipt."

Q. He said that in Yiddish? A. Yes, sir.

Q. And you understood it? A. Yes, sir.

Q. And then she signed a paper that you supposed to be the receipt that he asked for? A. Yes, sir.

Q. And who asked her to sign it? Who was it that called her "Ida?" That was her husband,
30 was it not? A. Yes.

Q. Mr. Siberman did not call her "Ida"? A. No, sir.

Q. Now, you did not see her sign another paper, did you? A. No, sir.

Adjourned until to-morrow, Wednesday, October 6, 1915, at ten o'clock, a. m.

Jacob Siff—Direct

THIRD DAY

Wednesday, October 6, 1915.

Met pursuant to adjournment.

Present, counsel as before stated.

10

JACOB SIFF, sworn in behalf of defendant:

Direct-examination by Mr. Macdonald:

Q. Mr. Siff, you are an attorney-at-law of the State of New Jersey? A. Yes, sir.

Q. Practicing in the City of Newark? A. Yes, sir.

Q. And how long have you been practicing? A. Since July, 1914.

Q. And you have been engaged as attorney for Mr. Blafer in this case, have you not? A. Yes, sir.

20

Q. And in September were you his attorney? A. When?

Q. In September? A. 1915?

Q. Yes. A. Yes, sir.

Q. Do you know David Schleier, the witness who was on the stand in this case? A. Yes, sir.

Q. As attorney for Mr. Blafer, did you interview Schleier? A. Yes, sir.

30

Q. Where? A. At his store, at Tenth Street, corner of Sixteenth Avenue, I believe it is. I also had an interview with him some time last winter, soon after I was engaged by Mr. Blafer. That interview took place at Mr. Blafer's home

The Court: You did not mention, Mr. Siff, when this interview on Tenth Street was.

40

Jacob Siff—Direct

Mr. Macdonald: Yes, I was just about to ask that, if the Court please.

Q. When did the interview occur at Schleier's store? A. It occurred recently; it was a week ago Sunday, I believe.

10 Q. And did you have a conversation then with Schleier in relation to what took place between Silberman and Blafer on August 10, 1914, when Schleier was present? A. I did.

Q. Will you state the conversation you had with Schleier? A. Which interview do you mean?

Q. At the store? A. At Schleier's store?

Q. Yes. A. Just before noon—

20 The Court: One moment. Let us consider this. Mr. Schleier is no party to the case, of course. He was a witness for the plaintiff. You ask him what he said. You want to contradict Schleier's testimony?

Mr. Macdonald: Yes, sir.

The Court: Should you not, under the rule, lay the foundation?

30 Mr. Macdonald: I think we did so. We asked him at this interview, in the first place, whether he did not hear Silberman tell Blafer about Greenberg and about buying the sugar from Greenberg, and he denied that he ever heard that. We asked him whether Mr. Blafer did not say to Silberman that he would try to get the sugar from Greenberg for him, if he could, and if he could not, of course then the deal would be off, and he denied having heard that. Then his attention was particularly directed to his statement, which I took down
40 carefully. He said that Blafer, the defend-

Jacob Siff—Direct

ant, said to his wife, "Take that contract and sign it," using the word "contract." All those things his attention was directed to, and also he denied that he knew the contents of this affidavit, or that it was read to him, or that it was explained to him; and Mr. Siff being a member of the bar, I thought that the best way was to simply have him tell what was said affirmatively, and that was the best and clearest way of clearing the matter up. 10

The Court: You may go on.

Q. You may proceed, Mr. Siff. A. About noon—just a little before noon on the Sunday in question I went with Mr. Blafer to the store of Mr. Schleier, David Schleier, and he was busy at the time, and when he had finished with his customers I interviewed him, and I asked him to tell me what he knew about the matter. He told me—Shall I state the contents of the affidavit, your Honor? 20

The Court: No, do not state the contents of any affidavit; state the contents of the conversation.

Q. State what he told you.

Mr. Boardman: I would like at this place to make objection to testimony as to what he said, not in the presence of any representative of the plaintiff. It does not appear to me that on the record the evidence that Mr. Siff is to contradict has been brought to his attention, if contradiction is the purpose. 30

The Court: I thought at first it was a case where contradiction was necessary. 40

Jacob Siff—Direct

Then I began to doubt about that. I am willing to consider the question again.

10

The General rule is that when the question is what a party said, that party being an outsider, so that what he said is not an admission, it is necessary to lay the foundation for a contradiction by asking him on his cross-examination, "Did you on such and such a day and at such and such a place make this statement?" stating the definite words which you expect to prove that he said. If the witness admits it, that ends the matter. If he denies it, then you can call a witness to contradict him by testifying that he did at the place and time make that statement, and then on the cross-examination of that witness the whole conversation may be inquired into. But the duty of laying the foundation and of calling the witness's attention to the question whether he did say a certain thing is a condition precedent to the reception of the entire conversation. Now, I do not see why that rule does not apply. As I understand, you want to prove what Mr. Siff remembers as to what Mr. Schleier said on that occasion. The rule is this: In justice to the witness, who is not interested in the case—(I am speaking now of the general situation)—such a witness not being interested in the case, is entitled not to be contradicted until he has had an opportunity to either admit or deny that he said a certain thing. Is that the way that you understand the rule?

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Jacob Siff—Direct

Mr. Boardman: Yes, your Honor.

Mr. Macdonald: That is the way I understand the rule. Mr. Siff himself examined this witness, and my recollection is that Mr. Siff called the witness's attention specifically to what he said bearing upon this matter, and asked him if he did not say that Silberman asked Blafer to go to Greenberg, because he could not go personally, and along that line, and then he asked him expressly about this affidavit, and whether it was not explained to him in Yiddish before he swore to it, and I am endeavoring to contradict him on those points. 10

The Court: Well, it is difficult for me, without having the testimony before me, to tell just how far the foundation was laid. If Mr. Schleier's attention was called to the matter in this way, "Did you at that time say so and so," that would be the foundation. 20

Mr. Macdonald: My recollection is that his attention was called to it; that is my recollection of the matter.

Mr. Boardman: Would it not be possible for the stenographer to turn to his notes of the testimony? 30

The Court: Yes, I think so.

(The stenographer reads the cross-examination of the former witness, David Schleier.)

Q. Mr. Siff, when you saw Schleier at his store in September did you write down in English, after talking with him, a statement in the form of an affidavit of what he told you relating to this case? A. I did. 40

Jacob Siff—Direct

Q. I show you D-2 for identification (Paper shown to witness). Is that the paper that you wrote at that time? A. Yes, sir.

10 Q. Now, after you had written that paper did you read it to Schleier? A. I explained to him—I translated to him exactly what was contained therein.

Q. And into what language did you translate it to him? A. In Jewish.

Q. Commonly called Yiddish? A. Yiddish.

Q. What has been referred to in this case as Yiddish? A. Yes, sir.

Q. Did you translate and explain to him in Yiddish everything that was contained in that paper? A. Yes, sir.

20 Q. And after you had done so did he sign it and swear to it? A. No, sir.

Q. Well, state what occurred in relation to that, then. A. After I had written this and explained to him in Yiddish exactly what it meant, I asked him would he sign it, and he said "No, I won't sign it." I says, "Well, why not?" He says, "Well, I don't know that what you are reading is so." "Well," I said to him, "I will call in anybody you want who can read English;" I says, 30 "Who do you want me to call in?" He says, "I don't know." "Well," I said, "Here, here is a little—here is a young man outside. Suppose I call him in. I will have him read it to you and translate it to you." He said, "All right." I walked to the entrance to the store and I called the young man in, and the young man came in, and I asked him if he could read English, and he said, "Yes," and I said, "Would you mind reading and explaining to Mr. Schleier exactly what 40 is stated in this affidavit?" And he said, "Yes,"

Jacob Siff—Direct

he would do it. So he started reading the thing entirely in English, and I stopped him, and I said, "Don't read it all at once; read a part of it and translate to him and explain to him exactly what that part means; explain each part to him." So he commenced again and he read a part and explained to him exactly what it meant. 10

By the Court: Q. That is, he read it in English?
A. He read it in English and then he explained in Yiddish to Mr. Schleier exactly what it meant.

Q. That is, he translated it into Yiddish? A. Into Yiddish; yes, sir; and I wish to add that he explained everything that was contained in the affidavit in that manner. I said, "Now, are you satisfied? Will you sign it now?" And he said, "Yes," he would sign it, and he signed it, and I took his oath to it. I asked him in Yiddish whether he swore that he knew the contents of the affidavit and that it was true, to the best of his knowledge and belief, so help him God, and he said he did. 20

By Mr. Macdonald: Q. And thereupon you subscribed your name as an attorney-at-law of the State of New Jersey, qualified to take an affidavit?
A. Yes, sir.

Mr. Macdonald: I now offer this paper in evidence, if the Court please. 30

Mr. Boardman: If your Honor please, I object to the admission of this paper on the ground that it appears to be an effort to change the terms of a written contract by extrinsic evidence. I insist that the contract in evidence, Exhibit P-1, is unconditional and absolute. I would object further, if your Honor please, on the ground that it 40

Jacob Siff—Cross

is hearsay evidence, even though in writing. It is introducing the word of someone, not under oath, in open Court, not subject to cross-examination.

The Court: I think it is receivable.

10

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Paper marked Exhibit D-2.

Mr. Boardman: Will your Honor allow me to ask whether it is allowed simply to impeach the witness or as evidence to the contract?

The Court: It is allowed for anything that it will prove.

20

(Mr. Macdonald reads Exhibit P-2.)

CROSS-EXAMINATION by Mr. Boardman:

Q. Mr. Siff, you explained the meaning of that to Mr. Schleier, you say? A. I did.

Q. And you were present when another person explained the meaning of it to him? A. I was.

30 Q. Did his explanation of it correspond with your explanation of it? A. You mean did he use the exact words or did he explain to him the meaning of it? Do you mean that he used the exact words that I did?

Q. No, that is not my meaning. Did this second interpreter explain it to Mr. Schleier to the same effect and with the same meaning in Yiddish that you had done? A. Yes, sir.

Q. Did Schleier appear to understand that man's translation better than yours? A. Better?

40

Mr. Macdonald: I object to that, if the Court please.

Isidor Silberman—Direct

Witness: Of course, I can't tell what was going on in—

Mr. MacDonald: One moment. I have objected to the question as being irrelevant and incompetent. It calls for a conclusion as to the state of mind of Schleier, which is impossible. 10

The Court: The objection is sustained.

Q. Mr. Siff, did you understand the translation that was given by the other person? A. I did.

Defendant rests.

Mr. Boardman: If your Honor please, I have a little rebuttal, but I wish at this point to move for the direction of a verdict for the plaintiff on the ground that, even on defendant's evidence, there was a deposit received and a receipt given for that, a receipt signed, a receipt which embodies the contract, the letter and telegram of the plaintiff to the defendant, and that there was no delivery. 20

The Court: I will not rule until the evidence is all in.

30

ISIDOR SILBERMAN, re-called in behalf of plaintiff in rebuttal:

Direct-examination by Mr. Boardman:

Q. Mr. Silberman, you heard the testimony of Mrs. Blafer yesterday afternoon? A. I did.

Q. And you heard her testify that when she went there you said, "All right"? A. I did. 40

Isidor Silberman—Direct

Q. Did you say—A. I did not.

10 Mr. Macdonald: One moment. Notwithstanding the eagerness of the witness to testify and reply to questions before they are asked, I desire to have an opportunity to object to a question when it is once asked. The question had not yet been put and completed when the witness anticipated some question and attempted to reply before I could object.

Mr. Boardman: Just wait every time, Mr. Silberman, until I finish my questions and until Mr. Macdonald has had a chance to speak.

20 Q. Did you when Mrs. Blafer came to you on the following morning say to her, "All right"?

Objected to as not rebuttal.

30 The Court: I am not able to say whether this precise question was asked, but it is a general rule of procedure, that, where new matter is brought out, the fact that that new matter has been the subject of cross-examination will not preclude the plaintiff on rebuttal from giving his own version of the new matter. Now, just in what connection it was testified that the words "All right" were said I am not able to say from my recollection of the testimony, nor do I know whether the witness's attention was called to that particular feature of the testimony on behalf of the defendant. I am not, therefore, prepared to rule against this question. You may answer the question.

(Question read.)

40 A. I did not.

Isidor Silberman—Direct

Q. Did you say anything with that meaning?

A. I did not.

Q. Did you in any way at that interview agree to the return of the check?

Mr. Macdonald: I object, if the Court please. That calls for the state of mind of the witness and not for the facts or conversation that occurred. 10

The Court: I suppose the question means, Did you say anything that indicated an agreement?

Mr. Macdonald: Yes, but he has already asked that; he has already asked if he said anything that meant "All right," and he said no. Now he is going to ask him whether he meant anything of the kind. 20

The Court: No, I do not so understand the question.

Mr. Boardman: No, you misunderstand me.

The Court: You may answer the question.

(Question read.)

A. No, I did not.

Q. Mr. Silberman, as testified to on both sides, there was a group of persons at Mr. Blafer's store on August 10th, when the transaction at the bottom of this suit was entered into. You have seen Mr. Sternberg here yesterday afternoon? A. I have. 30

Q. How long have you known him? A. Oh, I don't think over a year and a half.

Q. Did you know him by sight in August, 1914—August 10, 1914? A. Yes.

Q. Was he in the store at that time when you and Blafer— A. Positively not. 40

Isidor Silberman—Direct

Q. He testified that he was on the same side of the counter with you and perhaps two yards away; is that true? A. Certainly not; he was not there.

10 Q. Mr. Blafer has testified that he did not know whose check the \$150 check was. Did he know?

Objected to.

Question withdrawn.

The Court: The question is objectionable in that form.

Q. Did you tell him that it was Krasner's check?

Objected to.

A. I did.

Objected to as not rebuttal.

20 The Court: I think it is rebuttal for the witness to state his knowledge as to a statement made by the defendant in the defense which presents to the mind a new feature. The allegation that he did not know who signed the check that was given to him was a new proposition. I think the witness may be asked about that. But the question which you asked was a leading question, and is objectionable for that reason.

30 Q. Did you tell him whose check it was? A. I did.

Q. What did you tell him?

Objected to as not rebuttal and as repetition.

The Court: If the witness stated on direct-examination that he told Mr. Blafer that that was Mr. Krasner's check, then this would be a mere repetition.

40 Mr. Boardman: Yes. I did not remember that he had distinctly testified to that.

Motion for Direction of Verdict

The Court: We will assume that he did. That being so, I will sustain the objection.

Cross-examination waived.

Plaintiff rests.

10

Mr. Boardman: If your Honor please, I move for the direction of a verdict in favor of the plaintiff on the ground, as I stated before, that, under the defendant's own evidence, there has been a signing at the hands of Mrs. Blafer, but, by direction of her husband, of the receipt, which receipt evidences the contract in question, and that there has been received a telegram and letter calling for delivery; that there has been no delivery, and that the defendant has not in any way performed his contract. The rest it seems to be, is law.

20

"The Sales Act expressly provides that it is the duty of a seller, to deliver the goods and the law is also that one who can read is presumed to know the contents of that which is signed, and that the measure of damages is the difference between the agreed price and the market price at the time when delivery ought to have been made. A great deal of the testimony, of course, has been not on the essential point, and it seems to me that, under the very testimony of the defendant, combined with the clear law of the case, the plaintiff is entitled to a verdict, and to a verdict for the \$875, which represents one hundred barrels

30

40

Motion for Direction of Verdict

of sugar, the damage on the sale of one hundred barrels of sugar, three and a half-hundred-weight to the barrel at \$5 for each hundredweight, the difference between that and the market price, \$7.50, being \$2,50, and being found by multiplication to be \$875.

10

Mr. Macdonald: Your arithmetic is almost as bad as your law. The difference between \$5.10 and \$7.50 is not \$2.50.

Mr. Boardman: As to that, if it needs any comment, the plaintiff was entitled to a discount of two per cent, if payment was made within ten days after delivery; in other words, the plaintiff was entitled to two per cent, there being no delivery, which reduces the price to \$5.

20

The Court: I should grant your motion, if I were not in doubt about this question; whether, under all the circumstances of this case, the question does not arise whether the minds of the parties met. Of course, I express no opinion about it. It is true, as you say, that a person is presumed to understand the contents of a paper that he has signed and which he was called upon to sign as a part of his duty. At the same time, the question may arise in a given case whether the parties understood one another. That is the only thing I see in this case which would stand in the way of granting your motion. I think that question ought to go to the jury. For that reason I deny your motion.

30

Plaintiff's counsel prays an exception to this ruling of the Court.

40

Charge

Exception noted as ground of appeal.

Mr. Macdonald: If your Honor please, as a matter of form, and to keep the record clear, I renew the motion which I made at the close of the plaintiff's case, and on the grounds then stated I ask that the Court direct a judgment for the defendant. 10

The Court: The motion is denied.

Defendant's counsel pray an exception to this ruling of the Court.

Exception noted as ground of appeal.

Mr. MacDonald sums up for defendant.

Mr. Boardman sums up for plaintiff.

The Court charges the jury as follows: 20

Charge

ADAMS, J.:

Gentlemen of the Jury. More than two hundred years ago the English Parliament passed a statute entitled "An Act for the Prevention of Frauds and Perjuries," which, in the impressive language of the act—omitted, I am sorry to say, by our revisers—tend "not only to let or hindrance of the due course and execution of law and justice, but also to the overthrow of all true and plain dealing, agreements, bargains contracts and traffic between man and man, without which no commonwealth or civil society can be maintained or continued." This act was enacted in New Jersey in 1794. The sixth section of this act has been repealed, and the substance of it, in a somewhat different form, has been reenacted in the fourth 40

Charge

- section of An Act Concerning the Sale of Goods, passed in 1907. This section reads in part as follows: "A contract to sell or a sale of any goods or choses in action of the value of five hundred dollars or upwards shall not be enforceable by
- 10 action unless the buyer shall accept part of the goods or choses in action so contracted to be sold, or sold and actually receive the same, or give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract or sale be signed by the party to be charged or his agent in that behalf." This is the important part of the section. The evident purpose of this section was to
- 20 substitute certainty for uncertainty, and to diminish the temptation to commit fraud and perjury, by making it essential to the validity of a sale, of goods of a value of at least five hundred dollars that some easily provable thing should be done, so that a Court and jury inquiring whether a sale had been made, as we are now inquiring, would have only to ask whether the statute had been complied with, and would not be left to choose between vague oral assertion on one side and vague oral denial on the other.
- 30 Did the buyer accept part of the goods and actually receive the same? Or, did the buyer give something in earnest to bind the bargain or in part payment? Or, did the seller, either personally or by his agent, sign some note or memorandum in writing of the contract or sale? Those are the three questions by the answer to which it is determinable, under the statute, whether a
- 40 transaction is a sale. If any one of these questions is answered yes, then the statute has been

Charge

complied with, and there was a sale, unless for some other reason it is necessary to modify that conclusion.

You observe that each one of these three questions is definite, and should be susceptible of a definite answer. Did the buyer accept part of the goods? Ordinarily there would be no difficulty in proving whether he did or did not accept visible and tangible property. Somebody must have seen it and known it. Did the buyer give something in earnest to bind the contract or in part payment of it? There we have the definite question as to a payment of money or money value, and, time and place and mode of payment being testified to, ordinarily it would not be difficult to determine the question whether a payment had been made. Or did the seller, either personally or by his agent, sign some note or memorandum in writing of the contract or sale? There you are dealing with a written instrument, producible, if it existed, and evidential of its own contents. So that I think you will agree with me that the law is a wise law, in requiring the production of this kind of satisfactory evidence in order to establish the existence of a sale of goods of this kind.

Now, coming to the testimony what is the plaintiff's case as presented by the witnesses on his behalf? It appears that Mr. Isidor Silberman was an agent of the firm of Edward D. Depew & Company, a general grocery house in New York City, now represented by Frank Depew, the surviving partner. Mr. Davis, a witness on behalf of the plaintiff, testified that he is the buyer for that firm, and that he has supervision of the

Charge

10 sellers, or, as he put it, is manager of the salesmen; that Mr. Silberman was employed as a salesman by the firm; that he was one of several; and that on the 8th of August, 1914, on a Saturday, when Silberman came to the office for his weekly settlement he, Davis, talked to him about the sugar market, which was very unsteady, and told him that he could not get prompt deliveries from New York refineries, the demand for sugar exceeding the supply, and that he told him to buy what sugar he could of the small trade, as he expressed it, and on Monday, the 10th of August, he telegraphed to him to Newark to buy any quantity that he could get at the price limit of \$5.30 per hundred weight, not to exceed that, and as much lower as he could buy it.

20 Mr. Silberman, who was a witness on behalf of the plaintiff, testified that he went to Mr. Blafer, who was one of his customers for the firm, on the 10th of August, and he had a certain transaction with him as to the purchase of sugar. So far everybody agrees that Mr. Silberman did have a certain transaction with Mr. Blafer as to the purchase of sugar. The question is what that transaction was. On behalf of the plaintiff it is said that the transaction was a sale by Mr. Blafer to the plaintiff, through Mr. Silberman, the plaintiff's agent, of one hundred barrels of sugar of an average weight of 350 pounds, at \$5.10 per hundredweight. The question is whether this transaction, assuming that Mr. Silberman's statement of what the transaction was is correct—assuming that for the sake of the argument—meets the statutory requirement. Did the buyer, the Depew firm, accept part of the goods and actually receive

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Charge

the same? No, it did not. It is not necessary to the validity of the sale that it should. Or did the buyer give something in earnest to bind the bargain or in part payment?

The evidence, which is not disputed, is that a check of \$150, signed by a gentleman by the name of Krasner, was given by Mr. Silberman to Mr. Blafer. Mr. Krasner has testified that his account in the bank was good for that check. The check was borrowed by Mr. Silberman of Mr. Krasner for the purpose of using it in this transaction, and the firm of Edward D. Depew & Company reimbursed Mr. Krasner the next day by mailing him the firm's check for \$150. Mr. Krasner's check was given by Silberman to Mr. Blafer, and Mrs. Blafer, by her husband's direction, signed a receipt for the check, and here is the receipt: "Newark, N. J., August 10, 1914, 129 Prince street. Received from E. D. Depew & Company" (showing who was regarded as the purchaser)—"check for \$150, deposit on 100 barrels of gran."—(that is, granulated sugar)—"at \$5.10. Check given by I. Silberman to S. Blafer." Signed, "S. Blafer." It was not, in fact, signed by Mr. Samuel Blafer, but was signed by his wife as his agent, all of which is admitted. It is not necessary that a payment should be in cash. Under the statute, anything of value would do, and this check was a thing of value, as the evidence indicates. Under all the evidence in the case, the answer to the second question as to the payment must be that Mr. Silberman, as the plaintiff's representative, did give something in earnest to bind the contract or in part payment of it. That itself would fulfill the requirement of the statute as to a contract of sale.

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Charge

But, coming to the third requirement of the statute, the jury will ask again, did Mr. Blafer sign a note or memorandum in writing, in the language of the statute, of the contract or sale? The evidence on that subject is afforded by this paper, marked Exhibit P-1. It is a blank, perhaps taken out of a book by Mr. Silberman, and is ordinarily adapted, I should judge, to a sale by that house. Their name is crossed out at the top. In writing, or, rather, in pencil, is this: "Sold to," which is in print and then comes the writing: "E. D. Depew & Company, address, New York City," the "address" being printed; "Shipping directions," printed, and "Factory shipment," in writing; "Terms two per cent, ten days," which is explained to mean that payment within ten days is entitled to a credit of two per cent; and then comes the statement of what the article was: "100 bbls. granulated sugar; price, \$5.10. Witness, I. Silberman." Signed, "S. Blafer." Again, the evidence shows that that signature was made by Mrs. Blafer by direction of her husband, who does not read or write. That exhibit, P-1, was apparently the original of another exhibit, marked D-3 for identification, which is in evidence, because it has been referred to by both sides and it was made the subject of testimony, and it appears to be a carbon copy. It is an exhibit. This yellow paper appears to be a carbon copy of this and is identical with it (indicating). Even the signature appears although very faintly. So that the testimony and the documentary evidence indicates payment by the seller, and also a memorandum by the buyer, signed in conformity with the statute.

How does Mr. Blafer meet the plaintiff's case?

Charge

Substantially by saying that he understood the transaction to be, not a sale of 100 barrels of sugar by him to the plaintiff firm, but an attempt by the plaintiff firm to buy 100 barrels of a man by the name of Greenberg through Mr. Blafer, as a go-between, who was to be paid for his trouble. I need not say to a jury of practical business men that this defense is inconsistent with the documents in the case, which agree with the plaintiff's account of the matter and not with the defendant's account of the matter. You are the judges of the facts, but I say to you that a jury should be slow to release a man from the effect of contractual written papers on the ground that he understood them to mean something else than on their face they purport to mean, the general rule of law being, and nowhere more emphatically declared than in this state, that a man is supposed to understand a paper which he signs. Yet I have concluded to leave to you one question, which I have already indicated, and the thing that makes me cautious in the case is the fact of the illiteracy of Mr. and Mrs. Blafer. Mr. Blafer does not read or write; his wife writes and reads Jewish, or Yiddish, I think, but not English. She struck me as an intelligent woman. She has a fine face and was a good witness; she was clear headed. I ask you, after giving reasonable weight to the fact that Mr. and Mrs. Blafer are not conversant with written documents, do you or do you not think that they knew what they were doing, that they understood this transaction? Did the minds of the parties meet? If the contract was made as the plaintiff says that it was, it became at once binding, and Mrs. Blafer's attempt to return the check has

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Charge

no legal importance whatever. On the other hand, if you should reach the conclusion that the minds of the parties did not meet, why, then there was no contract and your verdict should be for the defendant.

- 10 If you find for the plaintiff you will have occasion to deal with the testimony as to the market value. You will see the common sense of the rule of law, and it is this: The measure of damages is the loss directly and naturally resulting, in the ordinary course of events, from the seller's breach of the contract. Where there is an available market for the goods in question, the measure of damages, in the absence of special circumstances showing proximate damages to a greater amount, is
- 20 the difference between the contract price and the market, or current, price of the goods at the time or times when they ought to have been delivered, or, if no time was fixed, then at the time of the refusal to deliver. You see that that is a legal way of simply saying this: That the value of a contract is what a man can make out of it. If he buys something for \$5 which he turns around and sells for \$6, he makes \$1. If he has an agreement with
- 30 a man to sell him something for \$5, and the man defaults on the contract and does not sell it to him, his loss is the profit which he would have made if the other man had carried the contract out as he ought to have done and that would be \$1. And so here. In this case the price was \$5 per hundred. The defendant had a reasonable time, under the evidence in the case, to deliver, if he made the contract, as the plaintiff insists that he did. What would be a reasonable time for the plaintiff,
- 40 Mr. Blafer, to deliver 100 barrels of sugar at the

Charge

point indicated by the telegram, or letter, a warehouse in Washington street, in New York? What would have been a reasonable time for him to have made that delivery? The dates are to be borne in mind. The sale was on the 10th of August, if there was a sale. Then add a reasonable time, and inquire what at that time was the market price. We have evidence as to market price. The evidence is that on the 13th it was \$6.75; that on the 14th it was \$7.50, and on the 17th, 18th, 19th, 20th and 21st it was \$7.50. 10

If you find for the plaintiff the difference between the market price on the day when it would be reasonable to say that delivery should have been made and the contract price of \$5.10 is the amount of the plaintiff's loss due to the failure of the defendant to carry out the bargain. Interest at 6 per cent should be calculated from the time when you fix the amount due, if you find for the plaintiff, down to the present time. 20

I will send to you the papers in the case.

The jury retires.

Mr. Macdonald: Now, if the Court please, I wish to take exception to this part of the Court's charge: First, to that part of the Court's charge in which the Court said substantially that, if the jury found for the plaintiff, they should assess damages at the difference between the contract price, which was \$5.10, and the market price upon any day which they found was a reasonable time for the delivery of the goods. 30

Exception noted as ground of appeal.

Mr. Macdonald: Also, to that part of the Court's charge in which the Court stated to the 40

Plaintiff's Requests to Charge

jury, or directed the jury's attention to the place of delivery as being at this storage warehouse on Washington Street, in New York City, mentioned in one of the exhibits.

Exception noted as ground of appeal.

- 10 Mr. Macdonald: Also to that part of the Court's charge in which it directed the jury that it might find interest, if it found damages, upon those damages from the date when they were supposed to have accrued. I except substantially to those parts.

Exception noted as ground of appeal.

Mr. Boardman: At this point will your Honor allow me an exception to your Honor's refusal to receive the requests and these questions?

- 20 The Court: The requests to charge were handed to me at the close of the summing up on behalf of the plaintiff, whereas, by a rule of Court, it is prescribed that requests to charge must be submitted to the trial judge before the beginning of the argument. The request to present certain questions to the jury was submitted at the same time, at the end of the whole summing up, at which time the Court had no time to give any consideration to the matter.

- 30 Mr. Boardman: I beg an exception on that.
Exception noted as ground of appeal.

Plaintiff's Requests to Charge

QUESTIONS FOR THE JURY OFFERED BY THE PLAINTIFF:

1. Did the defendant enter into an agreement with the plaintiff to sell (or selling) the latter 100
40 barrels of sugar?

Exhibit P-1

2. Did the defendant through his authorized agent sign a memorandum of such sale?
3. Did the plaintiff give something in earnest to bind the bargain or in part payment?
4. Did defendant deliver the sugar? If not, why not? Did defendant refuse to deliver? 10
5. Was the plaintiff ready to perform, to pay for the sugar?
6. Was the contract abrogated?
7. Was the contract void for any reason? If so, why?
8. On what date was defendant bound to deliver?
9. What was the market price on the date when defendant was bound to deliver? 20
10. Did Silberman have authority from E. D. Depew & Company for the purchase of sugar?
11. Was Silberman the agent of E. D. Depew & Company?

Exhibit P-1

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Order No. *Newark N J. Aug 10 1914*

~~EDWARD D. DEPEW & CO., New York, N. Y.~~

Sold to *Ed D. Depew & Co.*

Address *N. Y. City*

Shipping Directions *Factory shipment*

Terms *2% - 10 days*

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Exhibit P-3

QUAN.	BRAND	SIZE	PRICE
100	bbls Granulated Sugar		5.10
10	Witness: I. Silberman		

ENTER ONLY ONE ITEM ON EACH SLIP

Salesman

S. Blafer

Signature

Customer please sign here

Exhibit P-2

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128 Prince St. Newark N. J.-Aug 10-1914

Received from Ed. D. Depew & Co. check for \$150.00 Deposit on 100 bbls Gran. Sugar @ 5/10 check given by J. Krasner to I. Silberman to S. Blafer.

S. BLAFER.

Exhibit P-3

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Letter

August 12, 1914

Mr. S. Blafer
128 Prince St.
Newark, N. J.

Dear Sir:

Please instruct the refinery to deliver the one
40 hundred barrels of Fine Granulated purchased

Exhibit P-4

from you, to the Storage warehouse of the Lerbre Co. No. 466 Washington St. New York City for our account.

Kindly have this delivery made as quickly as possible and send us the invoice so that we can send check for the balance.

Yours very truly

E D DEPEW & CO

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HMD/TC

Exhibit P-4
Telegram

August 17, 1914

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Mr. S. Blafer
128 Prince St.
Newark, N. J.

Refinery has not yet delivered us the hundred barrels of granulated sugar purchased from you last week. Telegraph us at once at our expense the name of the refinery and the brokers name and we will call on them and hurry the delivery. We must have this sugar this week.

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EDWARD D. DEPEW & COMPANY
515 Canal St.
N Y City

Exhibit P-6

Telegram

August 10, 1914

10 Mr. I. Silberman
320 Springfield Ave
Newark, N J

If possible buy any granulated in barrels any
amount from any seller at best price obtainable
up to five thirty

F D DEPEW & CO

New Jersey Court of Errors and Appeals

FRANK DEPEW, surviving partner
of EDWARD D. DEPEW and
FRANK DEPEW, lately trading
as EDWARD D. DEPEW & Co.,
Plaintiff-Appellant,
vs.
SAMUEL BLAFER,
Defendant-Respondent.

Action at Law.

On Contract.

On Appeal.

BRIEF FOR APPELLANT.

(1) Statement of Facts.

This is a suit for damages for loss on a sale of goods not delivered. The court below questioned the defendant's sale.

Isidor Silberman, ordinarily a salesman for plaintiffs (Case, p. 16, lines 14 to 16; p. 156, line 40, and 157, top; called Monday, August 10, 1914, on their customer (p. 146, lines 35 to 40) Samuel Blafer, the defendant, now respondent, and entered into a transaction with him for 100 barrels of sugar. He gave Blafer a check for \$150 (Case, p. 124, line 38; 125, line 1 *et alibi*) for which Mrs. Blafer signed at her husband's direction a receipt (127, line 18; 148, first 10 lines), Exhibit P. 2 (p. 20, line 33 to p. 21, line 13; 186, line 20). She signed also "another little paper" (153, lines 16, 17) from a "book" (153, line 19; 125, line 13), of which paper Silberman took one copy (153, lines 34 to 36), P. 1 (p. 18 to p. 19, line 14), and left her another (153, lines 34 to 36), a carbon copy (Charge, 180, lines

32 to 34), D. 3 (41, lines 27 *et seq.*; 180, lines 28 to 32). Reference to the same (185, line 30) shows that it represents a sale from defendant to plaintiffs of 100 barrels of granulated sugar price 5.10, meaning \$5.10 per cwt. (67, line 17 and see p. 52 top), each barrel to contain 350 lbs. (66, line 32; 67, line 14).

Blafer received a letter dated August 12, 1914 (131, lines 7 to 15), P. 3 (89, lines 17 to 39), and a telegram of August 17 (131, lines 21 and 22), P. 4 (90, line 20 to p. 91, line 9 top), demanding delivery of said sugar (letter 90 top; 186, line 30; telegram 90 bottom; 187, line 20). He put them away (131, lines 17, 24 to 26) in the same place (131, line 25), but never effected any delivery of sugar to the plaintiffs (91, lines 37 to 40; 107, lines 27 to 29). The market price rose to \$5.50 or \$6 on August 11, 1914; \$6 August 12; \$6.75 August 13; and to \$7.50 August 14, 18, 19, 20, 21 (pp. 82, 86, 87). August 24, \$7.25 and \$7; September 9 around \$7.25 (pp. 87 and 88, see also 67, line 22). August 15, \$7.50 (51, line 34). Timely delivery by trade custom was 30 days (51, line 18); within 30 days at purchaser's option (92, lines 12 to 14, and 23); when customer wants it (57, lines 11, 12, 14 to 16); on this, "immediately," meaning 5 or 6 days (94, lines 14 to 24).

Defendant produces witnesses who testify to overhearing that Blafer should get the sugar from one Greenberg (152, lines 8, 9, 26 and 27; 156, lines 10 to 23), and Blafer swears that he promised Silberman to buy about a hundred barrels for him if Greenberg "has any sugar" (124, lines 32, 35 & 36). Blafer says he went immediately to Greenberg (127, lines 32 and 33), who was willing to sell at \$5.10 (136, lines 18 to 20) till 4:30 or 5 p. m. (128, lines 30 to 32), but insisted on more than \$50 or \$150 as deposit from Blafer (128, lines 19 to 29;

138, lines 11 and 12). Blafer hunted for Silberman till 5 p. m. (129, lines 11 to 15) and then sent his wife to Silberman to return the \$150 check receipted for (129, lines 36 to 38; 148, lines 21, 22 and 33). She stayed until midnight (149, line 23; 150, line 18) and went again early next morning (149, lines 25, 28 and 29), all at her husband's direction (152, lines 32, 34 and 37; 153 top; 130, lines 24 and 25). She saw Silberman at breakfast (149, line 34) or lunch (30, line 40); both rejected the check (149, line 35; 150, lines 5 to 9; p. 30, lines 35 to 40; p. 31, lines 15 to 19), and no witness unless it be Mrs. Blafer has seen it since (31, lines 19 to 22; 46, lines 21 to 24; 139, lines 21 and 22), although Krasner who had drawn it on his "good" account (48, top and lines 16 and 17), has had his vouchers returned about six or seven times since (46, first 20 lines). Three or four days after the Silberman purchase Blafer sold fifty barrels of sugar to Abraham Cohen at \$6.40 (75, first 6 lines). That week he bought sugar "every day" (143, line 35).

Defendant over plaintiff's strenuous objection introduced a paper, D. 2 (p. 168, first 20 lines) an alleged affidavit of David Schleier, the little boy (147, lines 22 and 23), lately an employee of Blafer's (34, lines 9 and 10), who did everything Blafer told him to (146, top). This exhibit was signed reluctantly by Schleier (44, lines 13 to 20) under urging by Mr. Siff (44, lines 17 to 19) and at the direction of Blafer (44, line 21) before Mr. Siff, then attorney for Blafer (161, lines 26, 27, 29 and 30). The full facts appear from the full testimony of Mr. Siff and Schleier. Schleier in court corroborated the narrative of Silberman and could not be shaken by Mr. Siff cross examining him (pp. 35 to 40).

A Specification of the Grounds of Appeal Relied Upon.

I. Errors committed during the trial.

1. The court admitted oral evidence to vary written.

This includes all of defendant's evidence in derogation of Exhibits P. 1 and P. 2, all defendant's evidence of significance in his behalf touching the transaction between the parties. It was impossible to take exception specifically to the errors as they occurred since the tendency of the same was not apparent till all was in. Pages 124, 125, 147, 148 and 156 of the Case contain most of this inadmissible testimony.

To the above must be added Exhibit D. 2 which has other infirmities outlined below (I. 2).

Had all the above pernicious evidence been excluded all other evidence as to Greenberg would have become irrelevant, and inadmissible on *that* score (pp. 127 lower part, 128, 135 foot, 136, 138, 139 upper part, 145, 151 foot).

2. The court admitted "for anything that it will prove" a writing purporting to be an affidavit of David Schleier (page 168, upper half): D. 2.

The court may have been misled by the misstatements of my learned opponent (Mr. Macdonald) on page 162, lines 26 to 40, as to Schleier having been asked questions about Greenberg and denying, whereas Greenberg was never mentioned to Schleier on the witness stand (pp. 35 to 43). Some of his defenses defendant anticipated in his cross examination of plaintiff's witnesses, but the Greenberg story was kept entirely secret from the jury and from plaintiff's party until the defendant took the stand. It was also a misstatement (p. 163, lines 7 and 8) that Schleier denied having the paper read to him, he admitted its reading in English (37, lines 17 and 19).

Infirmities in said purporting affidavit.

(1) This writing was incompetent. (See 2 to 7 below.)

(2) It attempted to vary a written contract between the parties. Its version of the transaction is similar to Blafer's and Sternberg's (pp. 124 and 156). [Appellant's counsel has asked Blafer, Mr. Macdonald and Mr. Siff for this exhibit, P. 2, or a copy, but all deny having it.] The contract in question appears in P. 1 (p. 185, line 30).

(3) D. 2 was an extrajudicial statement of a private person and so was inadmissible. It was signed by the boy Schleier in his own store (38, lines 22 and 23) with no representative of plaintiff present at all (36, lines 26 to 29).

(4) David Schleier was in court available as a witness for defendant (p. 33, *et seq.*).

(5) D. 2 was signed on Sunday (35, lines 37 and 38; 162, lines 6 to 8), and sworn to, if at all, on that day (39, line 40; 167, lines 20 to 25).

(5b) D. 2 was sworn to, if at all, before an attorney then representing defendant (161, lines 24 to 27).

(6) D. 2 was prepared pending suit and but shortly before the trial (p. 162, lines 6 to 8; p. 36 top); eight days before the trial which began Monday, October 4, 1915 (p. 15, line 19). Summons and complaint had been served August 21, 1914 (p. 4, lines 38 to 40). Hr. Siff had interviewed young Schleier while he (Schleier) was still in Blafer's employ (p. 161, lines 34 to 36). When the case was close to call Mr. Siff and Blafer went to Schleier's and got this paper signed (p. 163, lines 17 to 22; 36, line 12; 167, lines 18 to 20).

(7) D. 2 was signed under misunderstanding (p. 166, line 27; 38, lines 20 to 21; 44, lines 13 to

16) and under duress (p. 44, lines 17 to 21). Blafer was present as well as Mr. Siff (p. 36, lines 27 and 28; 163, lines 18 to 20).

II. Errors at the close of the trial involving the whole case.

1. Refusing to direct a verdict for plaintiff (p. 174, lines 37 to 38).

2. Ruling that the jury might find "no meeting of minds" (p. 174, lines 24, 25; p. 182, lines 5 to 9).

3. Inconsistently charging the jury; stating correct legal principles which involved, in application to the actual evidence of this case, a direction of a verdict for plaintiff (pp. 175 to 183; especially p. 180, lines 36 to 39; 181, lines 20 to 22, 39 and 40).

4. Going outside the issues intelligibly raised by the pleadings for the one question submitted (pp. 6, 7, 9 and 10; 174, line 22; 181, lines 23 and 24).

5. Refusing (p. 184, lines 25 to 29) to submit plaintiff's questions (p. 184, line 35 to p. 185, line 28), by answering which the jury would have revealed its failure to follow the charge, so that the application which was made for a new trial would have been necessarily granted.

6. Accepting a verdict contrary to all legal evidence (indicated by judgment p. 13, lines 15, *et seq.*).

III. Errors of the jury reviewable here.

1. The verdict was against the weight of evidence, yes against all the legal evidence.

2. The verdict was contrary to law.

Brief of the Argument.

For the reasons hereinafter set forth the appellant claims reversal for—

I. *Errors committed during the trial.*

1. The court admitted oral evidence to vary written.

Oral evidence is inadmissible to vary or contradict the terms of a written instrument.

1 Best on Evidence, 223, 226.

2 Parsons on Contracts (1855), sec. 10, p. 60.

Greenleaf on Evidence, 275.

Society for Estab. Useful Manufactures vs. Haight, 1 N. J. Eq., 393.

Naunberg vs. Young, 44 N. J. L., 331; 43 Am. Rep., 380.

Hanrahan vs. National Building, etc., Assn., 66 N. J. L., 80; 48A, 517.

Fitch vs. Archibald, 29 N. J. L., 160.

Schenck vs. Spring Lake, etc., Co., 47 N. J. Eq., 44; 10A, 881.

This rule applies in full force to contracts of sale, which therefore cannot be added to, varied, contradicted or controlled by parol or extrinsic evidence.

17 Cyc., 607 and its note, 88.

Rogers vs. Colt, 21 N. J. L., 704.

Rittenhouse vs. Tomlinson, 27 N. J. Eq., 379.

Nor is parol evidence admissible to prove how a written contract was understood by either of the parties in an action upon it at law in the absence of fraud.

Bigelow vs. Collamore, 5 Cush., 226.

Harper vs. Gilbert, *id.* 417.

Deweese vs. Manhattan Ins. Co., 35 N. J. L., 366.

If through mistake an agreement in writing does not express the contract which the parties intended to make, the remedy is in equity to reform it, but until it is so reformed it is unassailable by parol testimony.

Van Horn vs. Van Horn, 49 N. J. Eq., 327; 23 A., 1079.

The only defenses which can be shown orally against a written contract are fraud or such misrepresentation by plaintiff as causes defendant to believe that there is no contract, as in the case of *Alexander vs. Brogley*, 63 N. J. Eq., 307; 43 A. 888.

There is no allegation of fraud or misrepresentation in the answer, nor was any evidence of fraud (nor of misrepresentation except possibly by inference) brought out by the defense. That Silberman made a good purchase is admitted by the plaintiff, but there is no evidence whatever of any undue influence or any impropriety on the part of Silberman further than that he was perspiring, which is a very natural condition on the 10th of August. If "perspiring" is intended to be understood in a figurative sense there was certainly much less of it on Silberman's part than there was on the part of Blafer, who did his best through his wife from 5 P. M. till midnight that day, and from 6 to 7 or 8 A. M. the next day, trying to wriggle out of the bargain, by return of the check for which all defendant's witnesses admit a receipt had been signed by Mrs. Blafer at his direction.

2. The court admitted "for anything that it will prove" a writing purporting to be an affidavit of David Schleier. D. 2 (p. 168, upper half.)

a. This writing attempted to vary the written contract between the parties, P. 1 (p. 185, lines 30 *et seq.*). [Appellant after inquiry from respondent

and from Messrs. Macdonald and Siff is unable to reproduce D 2, but its contents resembled the stories of Blafer and Sternberg (pp. 124 & 156).]

This evidence was therefore incompetent and inadmissible under the authorities cited for I 1, *supra*.

b. This exhibit was an extrajudicial statement of a private person. It was signed by the boy Schleier in his own store (p. 38, lines 22 & 23), with no representative of the plaintiff, no judge or commissioner, no impartial administer of oath present at all (p. 36, lines 26 to 29), and with no pretense of notice.

Such statements are inadmissible under the hearsay rule.

1 Greenleaf on Evidence, 498.

Morrow vs. Inhabitants of the Township of Vernon, 35 N. J. L., 490.

North Hudson Co. R. R. Co. vs. May, 48 N. J. L., 401.

c. This exhibit was signed on Sunday (p. 35, lines 37 & 38; p. 162, lines 6 to 8), and sworn to, if at all, on that day (p. 39, line 40; p. 167, lines 20 to 25).

It is therefore illegal and should have been rejected on this ground:

Sloan vs. Williford, 25 N. C., 307.

d. It was sworn to, if at all, before an attorney then representing defendant (p. 161, lines 24 to 27).

This invalidates it is an affidavit.

Pullen vs. Pullen, 17 Atl., 310.

Den vs. Geiger, 9 N. J. L., 225.

Allis vs. Stowell, 85 Fed., 481.

If this practice is permitted the door is opened to all kinds of impositions and frauds.

Crawford vs. Ferguson, 5 Okla. Cr., 377, 379; 115 P., 278; 45 L. R. A. N. S., 519.

e. D 2 was prepared pending suit and but shortly before the trial (p. 162, lines 6 to 8; p. 36, top), eight days before the trial which began Monday, October 4, 1915 (p. 15, line 19). Summons and complaint had been served August 21, 1914 (p. 161, lines 34 to 36). When the case was close to call Mr. Siff and Blafer went to Schleier's and got this paper signed (p. 163, lines 17 to 22).

Statements made *post litem motam* must be rejected.

31 Cyc., 967.

16 Cyc., 1240.

f. D 2 was signed under misunderstanding (p. 166, line 27; p. 38, lines 20 to 21; p. 44, lines 13 to 16), and under duress (p. 44, lines 17 to 21). Blafer was present as well as Mr. Siff (p. 36, lines 27 & 28; p. 161, lines 18 to 20). The purpose is clear that they intended so to tie up the testimony of Schleier that he would not dare to testify to the contrary on the trial (pp. 166 & 167).

An admission is not of sufficient probative weight to be competent unless it is voluntary.

Truby vs. Seybert, 12 Pa. St., 101.

Statements obtained by duress are not admissible.

New Orleans City Bank vs. Foucher, 9 La., 405.

Tucker vs. Barrow, 143 E. C. L., 463.

Robson vs. Alexander, 17 E. C. L., 614.

Carr vs. Griffin, 44 N. H., 510.

II. Errors at the close of the trial involving the whole case.

1. Refusing to direct a verdict for plaintiff (p. 174, lines 37 to 38).

This was error: If the evidence is clearly insufficient to justify a verdict for defendant it is the duty of the judge to direct a verdict for plaintiff.

Harlman vs. Alden, 34 N. J. L., 518.

Vandegrift Construction Co. vs. Camden, etc., R. R. Co., 65 A., 986.

Loper vs. Somers, 71 N. J. L., 657; 61 A., 85.

Meyers vs. Birch, 59 N. J. L., 238; 36 A., 95.

Lippincott vs. Royal Arcanum, 64 N. J. L., 309.

Meyer vs. Madreperla, 68 N. J. L., 258; 53 A., 477.

2. Ruling that the jury might find "no meeting of minds" (p. 174, lines 24, 25; p. 182, lines 5 to 9).

This was error because the memorandum of sale was clear and absolute and excludes all extrinsic evidence to the contrary.

2 *Parsons on Contracts* (1855), §10, p. 60, and cases cited at the head of this argument, I 1.

A person is presumed to know the contents of an instrument signed by him.

Fivey vs. Penna. R. R. Co., 67 N. J. L., 627; 52 A., 472.

Van Deventer vs. Van Deventer, 46 N. J. L., 460.

Williams vs. Leisen, 72 N. J. L., 410; 60 A., 1096.

Alexander vs. Ferguson, 63 A., 998.

Feigenspan vs. Nizolek, 65 A., 703.

If a person cannot read the language it is his duty to have it read to him before he signs.

Phillip vs. Gallant, 1 Hun., 528.

Chicago, etc. R. Co. vs. Belliwith, 83 Fed., 437; 28 C. C. A., 358.

Muller vs. Kelly, 116 Fed., 545.

Weller's Appeal, 103 Pa. St., 594.

3. Inconsistently charging the jury; beautifully stating correct legal principles which involved, in application to the actual evidence of this case, a direction of a verdict for plaintiff (pp. 175 to 183; especially p. 180, lines 36 to 39; p. 181, lines 20 to 22, 39 & 40).

Such inconsistency is ground for reversal.

Huebner vs. Erie R. R. Co., 68 N. J. L., 468; 53 A., 545.

4. Going outside the issues intelligibly raised by the pleadings for the one question submitted (pp. 6, 7, 9 & 10; p. 174, line 22; p. 181, lines 23 & 24).

5. Refusing (p. 184, lines 25 to 29), to submit plaintiff's questions (p. 184, line 35 to p. 185, line 28), by answering which the jury would have revealed its failure to follow the charge, so that the application which was made for a new trial would have been necessarily granted.

"The court may request the jury to return answers to written questions embracing the disputed facts in issue and the amount of damages. In case of a rule to show cause for a new trial or an appeal, a statement of the case, including the questions and answers, shall be prepared and filed and shall have the effect of a special verdict. In considering the case upon review, the court may draw inference of fact."

Practice Act of 1912, sec. 70, P. L., p. 397.

6. Accepting a verdict contrary to all the legal evidence.

This is another aspect of the same error attacked in 1 and 2 above.

III. Errors of the jury reviewable here.

1. The verdict was against the weight of evidence, yes, against all the legal evidence.

2. The verdict was contrary to law.

These errors III, 1 and 2, were urged upon the application for a new trial and were therefore not expressly reserved for use upon this appeal.

General Argument.

The title of the old Statute of Frauds read as follows: "An act for the prevention of frauds and perjuries which tend not only to let or hindrance of the due course and execution of law and justice, but also to the overthrow of all true and plain dealings, agreements, bargains, contracts and traffic between man and man, without which no commonwealth or civil society can be maintained or continued."

The Statute of Frauds under the revision of 1877, section 6, reads thus: "That every contract for the sale of goods, wares, and merchandise for the price of \$30. or upward shall be void unless (1) a note or memorandum of such contract be made in writing and signed by the party to be charged thereby or by his agent thereunto lawfully authorized, or (2) unless the buyer shall accept part of the goods so sold and actually receive the same, or (3) unless the buyer shall give something in earnest to bind the bargain or pay some part of the purchase money." C. S. § 6.

The Sale of Goods Act of 1907 provides in section 4 as follows: "A contract to sell or a sale of any

goods or choses in action of the value of \$500 or upward shall not be enforceable by action unless the buyer shall accept part of the goods or choses in action so contracted to be sold or sold, and actually receive the same, or give something in earnest to bind the contract or in part payment, or unless some note or memorandum in writing of the contract or sale be signed by the party to be charged or his agent in that behalf." P. L., 1907, p. § 4.

As the court charged the jury: "The evident purpose of this section was to substitute certainty for uncertainty and to diminish the temptation to commit fraud and perjury by making it essential to the validity of a sale of goods of a value of at least \$500 that some easily provable thing should be done, so that a court and a jury inquiring whether a sale had been made, as we are now inquiring, would have only to ask whether the statute had been complied with, and would not be left to choose between vague oral assertion on one side, and vague oral denial on the other."

"Did the buyer accept part of the goods and actually receive the same?" No. "Did the buyer give something in earnest to bind the bargain or in part payment?" Yes. "Did the seller, personally, or by his agent, sign some note or memorandum in writing of the contract or sale?" Yes. "If any one of these questions is answered 'Yes' then the statute has been complied with, and there was a sale, unless for some other reason it is necessary to modify that conclusion," and the court manifestly erred in imagining such "other reason." The court proceeds: "You observe that each one of these three questions is definite and should be susceptible of a definite answer. Did the buyer accept part of the goods? Ordinarily there would be no difficulty in proving whether he did or not. Somebody must have seen it, and known it. Did the buyer give something in

earnest to bind the contract or in part payment of it? There we have the definite question as to a payment of money or money value; and time, place, and mode of payment being testified to, ordinarily it would not be difficult to determine the question whether a payment has been made. Or did the seller, either personally or by his agent, sign some note or memorandum in writing of the contract or sale? There you are dealing with a written instrument producible, if it existed, and evidential of its own contents, so that I think you will agree with me that the law is a wise law in requiring the production of this kind of satisfactory evidence in order to establish the existence of a sale of goods of this kind."

The court below was misled into questioning whether there was a meeting of minds. The word "agreement," as we have all been taught, means *aggregatio mentium*, a piling up of minds, but a meeting of minds in the legal sense is not lacking in all cases where the parties did not actually understand each other. The court admits in the charge to the jury, that the general rule of law is, and is nowhere more emphatically declared than in this State that a man is *supposed* to understand a paper which he signs. This must be the law, and a signed contract must bind the signer even if he does not in fact appreciate what he has signed, and certainly the rule is wholesome against a signer's *say-so* that he did not understand what he was signing.

This leads to a discussion of the facts and to a psychological study of the Blafers as they are revealed in their evidence. Mrs. Blaffer, at Mr. Blaffer's direction signed a receipt, as they both admit, a receipt for a \$150 check, which they likewise admit receiving. They admit further that Mrs. Blaffer signed another paper, which is recognized as being

a separate and different kind of paper even though they deny all use of the word "contract" in connection with Blafer's telling his wife to sign. It is absurd to suppose that so intelligent a woman, as the court found Mrs. Blafer to be, should think that these two pieces of different kinds should both be receipts for the same check, especially as she admits that the paper which was taken from a book had a duplicate which was left with them (D. 3), while Silberman took the original (P. 1), beside the receipt (P. 2). It must at least have put her on inquiry as must also Silberman's leaving her a copy of a "receipt," as she calls it. Samuel Blafer has been in business for years, and does not merely a cash business but a check business. He has in his wife a clear headed business adviser and it is incredible that one of them at least, yes both of them, did not know what they were signing. If they did not it was their duty to inquire of one of the customers or of their good friend, Solomon Sternberg, evidently well acquainted with the English language, to advise them as to what these documents were. The business was evidently nothing which they cared to conceal from Sternberg since he heard, as he swears, the conversation and saw the handing over of the check. He saw the receipt signed, as he says, and although he did not see what Mrs. Blafer was signing, he "should say she signed a receipt." He could easily have been asked to look at it and advise the Blafers (if in fact he was there at all, as Silberman denies). There were customers in the store who could have been asked to help, and if they were unable to do so, the Blafers could have declined to sign until they had information as to what they were being asked to sign, just as David Schleier did when he was asked to sign D. 2. "I told him I will take it to my brother. I will take it to another man what understands the language and he will read it to me." (p. 44, ll. 14 to

16). Very different was Blafer's attitude. He was positive, "he hollered" "from far" (p. 156, l. 27; p. 148, top), to his wife to sign the papers, and apparently was as perspiring to get it done, as, he says, Silberman was to have him sign it.

Now the court below was in error as to the fact of the Blafer's illiteracy. Let their own testimony speak. Mr. Blafer says: "I only sign in Yiddish." "You do not write any papers, do you?" "In Hebrew I can" (p. 137, last three lines). When asked "Can you read Yiddish?" "A little" (p. 134, l. 15); that he reads appears from p. 141, l. 30, where after saying that he found D. 3, the carbon copy of the memorandum of sale, in the register he says, "I wanted to know what it was; I took out other papers and I read them also." In lines 33 to 36 he testifies thus: "And you read this one?" "I asked a boy to read it over to me." What boy, Schleier?" "No a customer was there." If his own reading testified to in line 30 was not sufficient, so that he got a customer to read it also, why did he not get a customer to read it when Silberman first handed it to him or a little earlier before it was signed; there were customers in the store then, and it is clear from the testimony that the transaction was not kept private or quiet. The inference is irresistible that no customer was asked to read P. 1, or P. 2 or D. 3, when they were signed, *because* the Blafers were able to read them themselves.

The court below received the impression that Mrs. Blafer was an intelligent woman, but that Mr. Blafer was not intelligent. It is, however, noticeable both in his testimony and in hers that he is the boss and she follows his directions, leaving to his judgment what should be done. A careful reading and re-reading of his testimony simply enforces the impression that a good deal of his stupidity was intentional; there was a method in his imbecility.

Blafer admits having received into his hands from Silberman a check for \$150, but wants us to believe that he did not look at the amount or the signature of the check, but just put it away; he was busy (p. 137, ll. 9 to 16).

Silberman showed Blafer the receipt, but Blafer without looking at it and without asking to have it read to him even by Silberman, told his wife to sign it. This is all in his own testimony. He saw Silberman write it but did not see what his wife signed. It is impossible to get away from the inference that in their business dealings Blafer had always found Silberman reliable and trustworthy. Any other conclusion would convict Blafer of the grossest negligence in connection with important business affairs.

The more the Blafers thought about the predicament into which they seemed to think they had come, the more they worried and cogitated and persuaded themselves of this story about Greenberg, of a sale to Depew through Silberman, conditioned upon a purchase from Greenberg.

It was natural that Blafer should go to Mr. Greenberg to get sugar if he (Blafer) had no sugar and he knew that Greenberg did have.

The fact that Blafer was able to buy sugar from Greenberg at \$5.10 shows that Silberman set no unconscionable price when after argument with Blafer that price was put into the contract P. 1. This is further indicated by the fact that according to Blafer's testimony Greenberg held that price open to him all day until half-past four or five o'clock, and according to Blafer's testimony he went right to Greenberg after making arrangements with Silberman, Silberman's call on Blafer being about 7:30 or 8 in the forenoon. This shows that Silberman's "perspiring," if he was perspiring at that early hour, was not due to any haste at Blafer's ex-

pense, but must be attributed to Silberman's haste to clean up one job and to go on about his other business. Mr. Sternberg for the defendant testifies that Silberman was in the store twenty or twenty-five minutes after *he* came in. If Silberman could spend twenty or twenty-five minutes getting this purchase fixed up right with a signed contract and a receipt, his briskness must be attributed to his businesslike methods, not to any plan to take advantage of Blafer. Mr. Silberman's testimony will show that he is a live wire, but certainly in these days of preparedness, industrial preparedness will not be censured.

Near the foot of page 143, Blafer testifies that he was so much in the sugar market that he bought "every day," that he sometimes bought of one salesman and sometimes of another; perhaps this is because one salesman would not deal with him more than once. That would naturally be their attitude if he even seemed to fall down on his contracts with them as he has with Depew.

Blafer knew at the time of the Silberman purchase that Greenberg had sugar to sell and he knew perfectly well that Silberman would be ready with the cash at the proper time, both because his house (Edward D. Depew & Co.) was thoroughly reliable and also because Silberman had friends like Krasner from whom he could get the loan of \$150 or any like sum by simply asking for it. Nor did Blafer anticipate or realize any difficulty in the price. His whole trouble as his own testimony compels us to believe, arose from his poor credit with Greenberg. After he had been to Greenberg and offered him \$50, and again with \$100 more and found that he must show a larger amount of money (or, we might guess, that same amount of money in some better form than Blafer's check) he became worried. Although he was so busy attending to

customers when Silberman was at his store that he did not take trouble to look at the papers which Silberman wrote out, yet realizing that he was bound by a contract made, he let *customers* go for the rest of the day and went around looking for Silberman from 10 A. M. say to 5 P. M. Realizing then that it was too late to buy from Greenberg except at a loss on his contract with Silberman, he gave up going around looking for Silberman and gave the check to his wife to take to Silberman's house. It may all be true that Blafer went to Greenberg after Silberman had left his store, it may even be true that he mentioned Greenberg to Silberman as one from whom he could buy sugar, but that is not inconsistent with the fact that Silberman wanted and obtained, as in duty to his house he should obtain, a *clean cut contract* of sale from Blafer.

Although Blafer could not remember the price that he agreed on with Silberman nor could he remember under the examination of plaintiff's counsel at what price he dealt with Greenberg, the court was finally able to get from him the answer (p. 136, line 19) "I think he told me 5,10, and the same price I offered him."

Mr. Blafer admits that he received the letter P. 3, which calls for delivery of the sugar, and the telegram P. 4, which urges immediate delivery and he put away both of these documents so that he was able to produce them at the trial. Although his counsel tried to have him say that he paid no attention to these papers his answers went no further than to say that he had nothing to do with these people, presumably meaning Edward D. Depew & Co., yet Blafer had in his possession D. 1, a batch of bills each with the name Edward D. Depew & Co. at the head, and he had D. 3 a carbon copy of the memorandum of sale on which the name of the plaintiff firm occurred both in printing and

in Silberman's handwriting, the printing being lined out. This letter and telegram P. 3 and P. 4 were put away, not put into the waste basket as they would have been if they had no importance to him; but were put away in the same place with each other.

Blafer testified repeatedly, "I do not know these people" (those who sent him the letter and the telegram, P. 3 and P. 4). "I have nothing to do with them; I never saw them" (p. 131, lines 18 to 20). "No, sir, I have nothing to do with them" (*i. b.*, lines 28 and 29); yet when taken off his guard by the question of juror No. 12, "Have you ever done any business with Edward D. Depew & Co. at all," he admits "I used to buy goods from them several times for the store when I needed it."

When Mrs. Blafer was asked who was in the store at the time of Silberman's transaction she answered "A little boy," "Schleier," not thinking of anyone else until she was reminded.

This description of Schleier as "the little boy" and the one who did what Blafer directed has a bearing upon the discussion of D. 2, since it shows how subject Schleier would naturally be to the pressings of Blafer and his lawyer, Mr. Siff.

It was little less than cruel how Schleier was surrounded by Blafer, whom he was accustomed to obey (p. 146, top), and by Blafer's interpreter lawyer, and by Trotler who was called upon by them to help them with the affidavit so-called. It was at Schleier's own store too, if it had been somewhere else Schleier might have run away but at home he couldn't get away from them. He was not big enough to make them leave.

Not only in Schleier's testimony but between the lines of Mr. Siff's testimony we can read the third degree to which the boy was subjected. Is it not a travesty on American justice, on our boasted New

Jersey justice that such an outrage should be allowed and upheld.

Blafer denies telling his wife to sign the contract but a copy of the contract was produced by him at the trial, a copy of which he had kept through all the intervening months.

It is noticeable how eager the defendant's attorney, Siff, was to guide the testimony. Examples of this occur on page 125, lines 31 to 34 inclusive, and on page 131, lines 18 to 28 inclusive.

It is very evident that Blafer's lawyers were a steering committee to keep him off shoals of any admission of signing or authorizing his signature on any contract, yet there is no escaping the fact that Mrs. Blafer did sign P. 1, and that the Blafers realized that they had entered into a contract, which they were extremely anxious to be relieved of, after finding that it was going to be impossible to deliver sugar to Silberman's house.

Mrs. Blafer stayed awake till midnight (130, lines 22 and 23), according to the ancient scripture: "Give not sleep to thine eyes nor slumber to thine eyelids, deliver thyself; go humble thyself and importune thy neighbor." Proverbs C. 6, verses 4, 5 and 3.

"To-day," her husband said, she must do it (132, line 32), remembering that it was said by the prophet: "Now is the acceptable time; to-day is the day to secure safety."

But the noble sentiment of the Psalmist was forgotten. Blafer was not "he that *backbiteth* not with his tongue, he that sweareth to his own hurt and changeth not, such a one as merits the sequel: "he that doeth these things shall never be moved." Psalm 15, parts of verses 3, 4 and 5. Blafer should not have sought "to rescind" his obligation (Answer par. 5, Case, p. 10, lines 15 to 18). He should have observed the words of the Preacher: "Pay

that which thou vowest;" "say not before the angel, that it was a mistake." Ecclesiastes c. 5, parts of verses 4 and 6.

The inconsistency of the trial judge requires a reversal. He leaves to the jury the question of whether there was any meeting of minds in connection with the transaction in question, yet at the foot of page 179 he charges the jury positively that something was given in earnest to bind the contract thus: "Under all the evidence in the case the answer to the second question as to the payment must be that Mr. Silberman, as the plaintiff's representative, did give something in earnest to bind *the contract* or in part payment of it. That itself would fulfill the requirement of the statute as to a contract of sale."

"So that the testimony and the documentary evidence indicates payment by the seller and also a memorandum by the buyer signed in conformity with the statute" (p. 140, lines 35 to 39).

These are positive predications of the judge's findings, and consistency required that he take the case from the jury.

The appellant (plaintiff below) submits that the manifest errors shown by the record require a reversal of the judgment for defendant below and the entry of a judgment for the plaintiff, appellant, and prays a *venire de novo* for the ascertainment and assessment of the amount of damages unless the court, exercising its power corresponding to the power of the Supreme Court on an application for a new trial, determines that a judgment for \$735 and interest, the minimum amount of plaintiff's damages under the evidence, should be entered in favor of plaintiff as an alternative.

If this court be of opinion that the court below was not *radically* wrong and did not err in refus-

ing to direct a verdict for plaintiff therein, but erred only in the admission of improper evidence and in other ways not controlling the entire case, then appellant prays a reversal of the judgment below and a *venire do novo* for the trial of the cause under the law to be pronounced by this court.

SAMUEL W. BOARDMAN, JR.,

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